

Title: Aurelia Davis, as Next Friend of LaShonda D.,  
Petitioner  
v.  
Monroe County Board of Education, et al.

Docketed:

November 20, 1997

Court: United States Court of Appeals for  
the Eleventh Circuit

Entry Date

Proceedings and Orders

Entry Date	Proceedings and Orders
Nov 19 1997	Petition for writ of certiorari filed. (Response due December 20, 1997)
Dec 18 1997	Brief amici curiae of NOW Legal Defense and Education Fund, et al. filed.
Dec 22 1997	Brief of respondents Monroe County Board of Education, et al. in opposition filed.
Jan 6 1998	Reply brief of petitioner Aurelia Davis filed.
Jan 7 1998	DISTRIBUTED. January 23, 1998
Jan 26 1998	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Apr 16 1998	Supplemental brief of petitioner Aurelia Davis filed.
Aug 7 1998	Supplemental brief of petitioner Aurelia Davis (Second Supplement) filed.
Aug 13 1998	Brief amicus curiae of United States filed.
Aug 26 1998	REDISTRIBUTED. September 28, 1998
Sep 29 1998	Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. Rule 29.2 does not apply.
	SET FOR ARGUMENT January 12, 1999.
Oct 19 1998	***** Motion of petitioner to dispense with printing the joint appendix filed.
Nov 2 1998	Motion of petitioner to dispense with printing the joint appendix GRANTED.
Nov 10 1998	Brief amici curiae of NOW Legal Defense and Education Fund, et al. filed.
Nov 10 1998	Brief amicus curiae of Rutherford Institute filed.
Nov 10 1998	Brief of petitioner Aurelia Davis filed.
Nov 10 1998	Brief amicus curiae of United States filed.
Nov 10 1998	Brief amici curiae of National Education Association, et al. filed.
Nov 16 1998	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
Nov 30 1998	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 4 1998	CIRCULATED.
Dec 8 1998	Brief of respondents Monroe County Board of Education, et

Entry Date

## Proceedings and Orders

al. filed.

Dec 8 1998 Brief amici curiae of Students for Individual Liberty, et al. filed.

Dec 8 1998 Brief amici curiae of National School Boards Association, et al. filed.

Dec 8 1998 Brief amicus curiae of Independent Women's Forum filed.

Dec 14 1998 Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.

Dec 14 1998 Motion of of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Dec 23 1998 Motion of National School Boards Association, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.

Dec 28 1998 Record filed.

Dec 29 1998 Reply brief of petitioner Aurelia Davis filed.

Jan 11 1999 Motion of National School Boards Association, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.

Jan 12 1999 ARGUED.



①

'97 843 NOV 19 1997

No. \_\_\_\_\_  
OFFICE OF THE CLERK

---

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

\_\_\_\_\_  
AURELIA DAVIS, as next friend of LASHONDA D.,  
*Petitioner,*

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,  
*Respondents.*

\_\_\_\_\_  
Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI**

\_\_\_\_\_  
MARCIA D. GREENBERGER  
VERNA L. WILLIAMS \*  
DEBORAH L. BRAKE  
NEENA CHAUDHRY  
NATIONAL WOMEN'S LAW CENTER  
11 Dupont Circle, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 588-5180  
*Attorneys for Petitioner*

November 19, 1997

\* Counsel of Record

129 PP

### QUESTIONS PRESENTED

1. Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which prohibits sex discrimination in federally funded education programs and activities, encompasses a cause of action for peer hostile environment sexual harassment.
2. Whether the legal principles regarding sexual harassment that have developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, should be applied to analyze claims of sexual harassment under Title IX of the Education Amendments of 1972.

### LIST OF PARTIES

The parties to the proceeding below were the Petitioner Aurelia Davis, as next friend of her daughter, LaShonda D., and the Respondents Monroe County Board of Education, Bill Querry, and Charles Dumas.

### TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
LIST OF PARTIES .....	ii
TABLE OF AUTHORITIES .....	iv
OPINIONS BELOW .....	1
STATEMENT OF JURISDICTION .....	2
STATUTE INVOLVED .....	2
STATEMENT OF THE CASE .....	2
A. Introduction and Factual Background .....	2
B. Proceedings Below .....	4
REASONS FOR GRANTING THE PETITION .....	6
I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE SPLIT IN THE CIRCUITS REGARDING TITLE IX'S APPLICATION TO PEER SEXUAL HARASSMENT..	6
A. The Circuits Are Split on Whether Title IX Imposes an Obligation on Schools to Address Student-to-Student Sexual Harassment .....	6
B. The Circuits Are Split on Whether Title VII Principles Should Guide Courts in Determining School Liability in Hostile Environment Cases Under Title IX .....	12
II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT .....	15
A. The Decision Below Contravenes This Court's Mandate to Read Title IX Broadly .....	15
B. The Decision Below Is At Odds With <i>Franklin</i> .....	17
CONCLUSION .....	19



## TABLE OF AUTHORITIES

CASES:	Page
<i>Bosley v. Kearney R-1 Sch. Dist.</i> , 904 F. Supp. 1006 (W.D. Mo. 1995) .....	10, 14
<i>Brown v. Hot, Sexy and Safer Prods., Inc.</i> , 68 F.3d 525 (1st Cir. 1995) .....	9, 12, 13
<i>Bruneau v. South Kortright Central Sch. Dist.</i> , 935 F. Supp. 162 (N.D. N.Y. 1996) .....	10, 14
<i>Burrow v. Postville Community Sch. Dist.</i> , 929 F. Supp. 1193 (N.D. Iowa 1996) .....	10, 14
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979) .....	16
<i>Canutillo Indep. Sch. Dist. v. Leija</i> , 101 F.3d 393 (5th Cir. 1996) .....	11
<i>Collier v. William Penn Sch. Dist.</i> , 956 F. Supp. 1209 (E.D. Pa. 1997) .....	10, 11, 14
<i>Doe v. Claiborne County</i> , 103 F.3d 495 (6th Cir. 1996) .....	12
<i>Doe v. Londonderry Sch. Dist.</i> , 970 F. Supp. 64 (D.N.H. 1997) .....	10, 11, 14
<i>Doe v. Petaluma City Sch. Dist.</i> , 949 F. Supp. 1415 (N.D. Cal. 1996) .....	8, 10, 14
<i>Doe v. Petaluma City Sch. Dist.</i> , 54 F.3d 1447 (9th Cir. 1995) .....	7
<i>Floyd v. Waiters</i> , 831 F. Supp. 867 (M.D. Ga. 1993) .....	14
<i>Franklin v. Gwinnett County Pub. Schs.</i> , 503 U.S. 60 (1992) .....	passim
<i>Franks v. Kentucky Sch. for the Deaf</i> , 956 F. Supp. 741 (E.D. Ky. 1996) .....	10, 14
<i>Garza v. Galena Park Indep. Sch. Dist.</i> , 914 F. Supp. 1437 (S.D. Tex. 1994) .....	10, 14
<i>Hastings v. Hancock</i> , 842 F. Supp. 1315 (D. Kan. 1993) .....	14
<i>Howard v. Board of Educ.</i> , 876 F. Supp. 959 (N.D. Ill. 1995) .....	14
<i>Kadiki v. Virginia Commonwealth Univ.</i> , 892 F. Supp. 746 (E.D. Va. 1995) .....	14
<i>Kinman v. Omaha Pub. Sch. Dist.</i> , 94 F.3d 463 (8th Cir. 1996) .....	12
<i>Kracunas v. Iona College</i> , 119 F.3d 80 (2d Cir. 1997) .....	12

## TABLE OF AUTHORITIES—Continued

	Page
<i>Lipsett v. University of Puerto Rico</i> , 864 F.2d 881 (1st Cir. 1988) .....	12
<i>Meritor Sav. Bank v. Vinson</i> , 477 U.S. 57 (1986) ....	16, 17
<i>Murray v. New York Univ. College of Dentistry</i> , 57 F.3d 243 (2d Cir. 1995) .....	9, 12, 13
<i>Nicole M. v. Martinez Unified Sch. Dist.</i> , 964 F. Supp. 1369 (N.D. Cal. 1997) .....	10, 13
<i>North Haven Bd. of Educ. v. Bell</i> , 456 U.S. 512 (1982) .....	16
<i>Oona, R.S. v. McCaffrey</i> , 122 F.3d 1207 (9th Cir. 1997) .....	7, 8, 12
<i>Patricia H. v. Berkeley Unified Sch. Dist.</i> , 830 F. Supp. 1288 (N.D. Cal. 1993) .....	14
<i>Piwonka v. Tidehaven Indep. Sch. Dist.</i> , 961 F. Supp. 169 (S.D. Tex. 1997) .....	10
<i>Rosa H. v. San Elizario Indep. Sch. Dist.</i> , 106 F.3d 648 (5th Cir. 1997) .....	11, 13
<i>Rowinsky v. Bryan Independent Sch. Dist.</i> , 80 F.3d 1003 (5th Cir. 1996) .....	7, 13
<i>Saville v. Houston County Healthcare Auth.</i> , 852 F. Supp. 1512 (M.D. Ala. 1994) .....	14
<i>Seamons v. Snow</i> , 84 F.3d 1226 (10th Cir. 1996) ....	8, 9
<i>Slaughter v. Waubensee Community College</i> , 1995 U.S. Dist. LEXIS 14236 (N.D. Ill. Sept. 29, 1995) .....	14
<i>Smith v. Metro. Sch. Dist. Perry Township, No. 95-3818</i> , 1997 U.S. App. LEXIS 29085 (7th Cir. Oct. 22, 1997) .....	11, 12, 13, 15
<i>Wright v. Mason City Community Sch. Dist.</i> , 940 F. Supp. 1412 (W.D. Iowa 1996) .....	10, 14
STATUTES AND REGULATIONS:	
20 U.S.C. § 1681 .....	passim
20 U.S.C. § 1687 .....	2
28 U.S.C. § 1254(1) .....	2
28 U.S.C. §§ 1331, 1343(3) .....	2
29 C.F.R. § 1604.11(d) .....	16



## TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES:	Page
Office for Civil Rights, Dep't of Educ., <i>Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties</i> , 62 Fed. Reg. 12,034 (Mar. 13, 1997).....	11

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

\_\_\_\_\_  
 No. \_\_\_\_\_  
 \_\_\_\_\_

AURELIA DAVIS, as next friend of LASHONDA D.,  
*Petitioner,*

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,  
*Respondents.*

\_\_\_\_\_  
**Petition for Writ of Certiorari to the  
 United States Court of Appeals  
 for the Eleventh Circuit**

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI**  
 \_\_\_\_\_

Petitioner, Aurelia Davis, as next friend of LaShonda D., respectfully petitions for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on August 21, 1997.

**OPINIONS BELOW**

The *en banc* opinion of the Court of Appeals is reported at 120 F.3d 130 (11th Cir. 1997) and is reproduced in the Appendix (App.) filed herewith. App. 1a. The opinion of the three-judge panel of the Court of Appeals is reported at 74 F.3d 1186 (11th Cir. 1996). App. 62a. The opinion of the district court in this case is reported at 862 F. Supp. 363 (M.D. Ga. 1994). App. 82a. The order vacating the three-judge panel decision

and granting the petition for rehearing *en banc* is reported at 91 F.3d 1418 (11th Cir. 1996). App. 91a.

### STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### STATUTE INVOLVED

The pertinent provision of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"), is set forth below:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

### STATEMENT OF THE CASE

#### A. Introduction and Factual Background

Petitioner Aurelia Davis brought this action against the Monroe County Board of Education ("Board") in 1994, challenging the Board's conduct in tolerating and condoning a pattern of severe and pervasive sexual harassment of her minor daughter, LaShonda D. Subject matter jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1343(3).

The complaint alleged that LaShonda endured a five-month barrage of sexual harassment and abuse by fellow fifth-grader "G.F." while she was a student at Hubbard Elementary School in Monroe County. Specifically, starting in December 1992, G.F. repeatedly attempted to touch LaShonda's breasts and vaginal area, directed vulgar language toward her, and engaged in other inappropriate

sexual misconduct in the classrooms and hallways of their school. After each instance of sexual misconduct, either LaShonda, Mrs. Davis, or both would complain to the appropriate teachers. *See Complaint*, App. at 95a-96a.

In May 1993, after enduring five months of persistent sexual harassment and receiving no response from school officials to her requests for help, LaShonda told her mother that she "didn't know how much longer she could keep [G.F.] off her." App. at 96a-97a. Mrs. Davis contacted Principal Querry to determine what action would be taken to protect her daughter. Mr. Querry responded by saying he "guess[ed he would] have to threaten [G.F.] a little bit harder," and asking LaShonda "why she was the only one complaining." App. at 97a.

At no time during G.F.'s five-month campaign of sexual harassment targeting LaShonda did the Board or its employees respond in a manner designed to stop the misconduct. Neither the Board nor its employees ever suspended or otherwise disciplined G.F. App. at 97a. In March 1993, a teacher refused to allow LaShonda and other girls whom G.F. had sexually harassed to meet with Principal Querry, telling them "[i]f he wants you, he'll call you." App. at 96a. Another teacher required LaShonda to sit next to G.F. during her class, ignoring LaShonda's repeated request over the course of three months for a new seating assignment to avoid contact with G.F. App. at 97a. Throughout the course of harassment, the Board had no policy prohibiting the sexual harassment of students in its schools, nor did it provide any training to its employees instructing them on how to respond to incidents of sexual harassment of students. App. at 98a.

The sexual harassment LaShonda experienced seriously interfered with her ability to benefit from the education provided by the Board at Hubbard Elementary School. The constant sexual harassment by G.F. lessened her ability to concentrate and caused her grades, previously



all A's and B's, to suffer. App. at 97a. In addition, the harassment had a debilitating effect on her mental and emotional well-being, causing her to write a suicide note that her father found in April 1993. App. at 97a.

#### B. Proceedings Below

Mrs. Davis filed a complaint against the Board in the United States District Court for the Middle District of Georgia on May 4, 1994, alleging a violation of Title IX of the Education Amendments of 1972, seeking injunctive relief and compensatory damages.<sup>1</sup>

The district court dismissed Mrs. Davis' claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure on August 29, 1994. The district court concluded that the Board's failure to respond to the repeated complaints by Mrs. Davis and LaShonda did not violate Title IX because "[t]he sexually harassing behavior of a fellow fifth grader is not part of a school program or activity." *Davis v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994). App. at 88a. The district court found that because neither the Board nor its employees "had any role in the harassment," "any harm to LaShonda was not proximately caused by a federally-funded education provider." *Id.*

On February 14, 1996, a divided panel of the Eleventh Circuit Court of Appeals reversed the district court's decision, ruling that a school district that knowingly permits a hostile environment created by a student's sexual harassment may be liable for injunctive and compensatory relief under Title IX. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir.), *vacated and reh'g*

<sup>1</sup> The complaint also alleged individual claims against Superintendent Charles Dumas and Principal Bill Querry, and additional claims against the Board for violation of LaShonda's constitutional rights and racial discrimination. However, only the Title IX claim against the Board is properly before this Court.

*granted*, 91 F.3d 1418 (11th Cir. 1996). App. at 62a. Relying on this Court's precedents regarding Title IX's construction and looking to well-settled principles governing sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the panel reasoned that Title IX affords students at least as much protection from sex discrimination in school as Title VII affords adults in the workplace.

The Eleventh Circuit vacated the panel decision and granted the Board's petition for rehearing *en banc* on August 1, 1996. *Davis v. Monroe County Bd. of Educ.*, 91 F.3d 1418 (11th Cir. 1996). App. at 91a. On August 21, 1997, the Eleventh Circuit, sitting *en banc*, held that Title IX does not provide a cause of action for peer hostile environment sexual harassment. The court found that Congress neither intended nor provided sufficient notice for educational institutions to be held liable for this form of sex discrimination under Title IX. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997). App. at 1a. In addition, the court held that legal principles regarding sexual harassment that have developed under Title VII are not applicable to Title IX claims of sexual harassment. *Id.* at 1400 n.13. App. at 19a-20a.

Judge Rosemary Barkett, joined by Chief Judge Hatchett, and Senior Judges Henderson and Kravitch, dissented from the *en banc* ruling of the court, noting that the majority decision conflicts with decisions of this Court, other courts, and with Title IX's language and legislative history. The dissent faulted the majority's analysis as conflicting with this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992): "[U]nder [the court's] narrow view, even the cause of action under Title IX for teacher-on-student sexual harassment recognized . . . in *Franklin* would not be supported by the majority's view of legislative history. *Davis*, 120 F.3d at 1413-14 (Barkett, Hatchett, Henderson, and Kravitch,

JJ., dissenting) (citations omitted). The dissent also took issue with the majority's conclusion regarding the applicability of Title VII principles, noting that "at least five circuit courts have found that Title IX standards are applicable to students' Title IX sexual harassment claims." *Id.* at 1415. The dissent applied these principles to conclude that Petitioner had stated a cause of action under Title IX. *Id.* at 1418-19.

### REASONS FOR GRANTING THE PETITION

#### I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE SPLIT IN THE CIRCUITS REGARDING TITLE IX'S APPLICATION TO PEER SEXUAL HARASSMENT.

The Eleventh Circuit's decision in this case exacerbates two principal splits among circuit courts addressing peer sexual harassment claims under Title IX: (1) whether Title IX requires a school to take appropriate corrective action in response to student-to-student sexual harassment of which the school knew or should have known; and (2) whether Title VII sexual harassment principles should guide courts' resolution of school liability for sexual harassment under Title IX.<sup>2</sup>

##### A. The Circuits Are Split on Whether Title IX Imposes an Obligation on Schools To Address Student-to-Student Sexual Harassment.

With the decision below, the Eleventh Circuit joins the ranks of the Fifth Circuit in ruling that Title IX does not require federally funded schools to take any corrective action to remedy a sexually hostile environment created

<sup>2</sup> In the interest of brevity, Petitioner uses the terms "school" or "schools" generally to refer to any education program or activity that receives federal funds, including colleges and universities, and notes that the unsettled questions of law discussed herein affect all entities that operate such programs or activities. See 20 U.S.C. § 1687.

by other students. The Eleventh Circuit forecloses Title IX liability for a school's improper response or failure to respond to sexual harassment by student-harassers. *Davis*, 120 F.3d at 1401. In this regard, the Eleventh Circuit takes a similar, though slightly more constrictive view of Title IX liability than the Fifth Circuit did in *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir. 1996). In *Rowinsky*, the Fifth Circuit ruled that Title IX liability may be established in a peer sexual harassment case only where the school responds differently to sexual harassment complaints based on the gender of the complainant. *Id.* at 1016.<sup>3</sup> Both the Fifth and Eleventh Circuits effectively counsel schools that they may comply with Title IX by ignoring all student complaints of a sexually hostile environment created by other students.

The Ninth Circuit has charted an entirely different course for school liability in peer sexual harassment cases under Title IX. Just eight days before the Eleventh Circuit issued its opinion in this case, the Ninth Circuit ruled that Title IX requires school officials to take prompt and appropriate corrective action to remedy sexual harassment by students. In *Oona, R.S. v. McCaffrey*, 122 F.3d 1207, 1209-11 (9th Cir. 1997), the court held that school officials did not have qualified immunity in a peer sexual harassment case based on conduct that occurred in 1992, because it was clearly established, as of this Court's decision in *Franklin*, that Title IX requires schools to take prompt and appropriate action to remedy a hostile environment created by students.<sup>4</sup> Acknowledging that its

<sup>3</sup> Although the Eleventh Circuit did not address the situation alluded to by the Fifth Circuit in *Rowinsky*, where a school responds differently to peer sexual harassment based on the gender of the complainant, the *Davis* court's reasoning, that school boards lacked notice of any potential liability for peer sexual harassment under Title IX, presumably would foreclose liability under that scenario as well. See *Davis*, 120 F.3d at 1401.

<sup>4</sup> This ruling builds on the court's earlier decision in *Doe v. Petaluma City School District*, 54 F.3d 1447 (9th Cir. 1995), which



ruling conflicted with the Fifth Circuit's decision in *Rowinsky*, the court explained:

We have difficulty squaring *Rowinsky's* reasoning with the Supreme Court's in *Franklin* and our own in *Petaluma*. They provide no basis for interpreting discrimination under Title IX so restrictively.

*Oona*, 122 F.3d at 1210. Consequently, schools and school officials in the Ninth Circuit have a duty under Title IX to take reasonable steps to stop peer sexual harassment of students once they have notice that it is occurring.

Aligning itself with the Ninth Circuit, at least in its articulation of the elements required to establish a Title IX peer sexual harassment claim, the Tenth Circuit also has recognized a cause of action for peer sexual harassment under Title IX. In *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), the Tenth Circuit adopted the five-part test set forth in the Eleventh Circuit's prior panel decision in this case, recognizing a Title IX action for student-to-student sexual harassment where: (1) the victim is a member of a protected group; (2) he or she was subject to unwelcome sexual harassment; (3) the harassment experienced was based on sex; (4) the harassment was sufficiently severe or pervasive as to create an abusive educational environment; and (5) some basis for institutional liability exists.<sup>5</sup> *Id.* at 1232 (citing *Davis*, 74 F.3d at 1194 (panel decision)). However, despite its

---

held that city school officials had qualified immunity from suit based on their failure to respond to peer sexual harassment before 1992, but suggested that it would reach a different result with respect to conduct occurring after the Supreme Court's decision in *Franklin*. *Id.* at 1452.

<sup>5</sup> The court declined to address the proper standard for establishing institutional liability in Title IX peer sexual harassment claims because it determined that the plaintiff failed to establish that the challenged conduct was based on sex. *Seamons*, 84 F.3d at 1233 n.7.

articulation of the elements of a Title IX peer sexual harassment claim based on the prior panel decision in *Davis*, the Tenth Circuit applied the test in a manner closer to the Fifth Circuit's formulation in *Rowinsky*, requiring the school's reaction to the harassment, as opposed to the harassment itself, to be "sexual" or "based on sex."<sup>6</sup> *Id.* at 1233. The Tenth Circuit's selective incorporation of elements from both sides of the circuit split on this issue reflects the muddled state of the law in this area.

In addition to the Ninth and Tenth Circuits, several other circuit courts, while not directly holding schools liable for failing to respond to peer sexual harassment, have suggested that schools may face Title IX liability in such cases. See *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995) (suggesting that schools may be liable for failing to respond to hostile environment sexual harassment by third party, but holding that no hostile environment existed in that case); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248-50 (2d Cir. 1995) (suggesting that school may be liable for failure to remedy known sexual harassment of dental student by patient, but finding that school did not have sufficient notice of harassment in that case).

Reflecting the circuit split on this issue, numerous district courts have reached opposite conclusions when faced with the question of whether Title IX imposes on schools any obligation to respond to peer sexual harassment once they have notice that such harassment is occurring. Most district courts that have addressed the issue have held

---

<sup>6</sup> The *Seamons* court's application of the "based on sex" requirement to the school's conduct, as opposed to the underlying harassment, may stem from the plaintiff's failure in that case to allege that the harassment itself was based on the student's sex, thus forcing the court to focus the "based on sex" inquiry elsewhere. *Seamons*, 84 F.3d at 1232-33.

that Title IX does impose such an obligation. *See, e.g., Doe v. Londonderry Sch. Dist.*, 970 F. Supp. 64, 74 (D.N.H. 1997); *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1377 (N.D. Cal. 1997); *Collier v. William Penn Sch. Dist.*, 956 F. Supp. 1209, 1212 (E.D. Pa. 1997); *Franks v. Kentucky Sch. for the Deaf*, 956 F. Supp. 741, 746 (E.D. Ky. 1996); *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1419-20 (W.D. Iowa 1996); *Bruneau v. South Kortright Central Sch. Dist.*, 935 F. Supp. 162, 172-74 (N.D. N.Y. 1996); *Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1426-27 (N.D. Cal. 1996); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193, 1204-06 (N.D. Iowa 1996); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1023 (W.D. Mo. 1995).<sup>7</sup> However, district courts in the Fifth Circuit have held that a school's failure to respond to known student-to-student sexual harassment does not violate Title IX. *See, e.g., Piwonka v. Tidehaven Indep. Sch. Dist.*, 961 F. Supp. 169, 171 (S.D. Tex. 1997); *Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437, 1438 (S.D. Tex. 1994).

Thus, the liability standard governing a particular school in a Title IX peer sexual harassment case will vary widely depending on where the school is located. While schools in the Fifth and Eleventh Circuits may safely ignore all student complaints of sexual harassment by

<sup>7</sup> Even these courts differ with respect to the level of proof required to demonstrate intentional discrimination in a peer sexual harassment claim for damages under Title IX. *Compare Petaluma*, 949 F. Supp. at 1424 ("[H]ostile environment sexual harassment is a type of intentional discrimination, but the intent is established by proof of the elements required to prove the cause of action and needs no additional proof."), and *Franks*, 956 F. Supp. at 748 (adopting *Petaluma* standard), with *Wright*, 940 F. Supp. at 1419-20 (requiring plaintiff to prove school district's intent to discriminate separate from elements of hostile environment claim in order to obtain damages, but permitting intent to be inferred from school's actual knowledge of harassment and intentional failure to act), and *Bosley*, 904 F. Supp. at 1020-21, 1023 (same).

other students, schools in the First, Second, Ninth and Tenth Circuits risk Title IX liability for the same course of conduct. Schools operating in other circuits, unless governed by one of the conflicting district court decisions addressing Title IX's application to peer sexual harassment claims, face the unenviable task of trying to make sense of this legal morass. Although a recent policy guidance issued by the Department of Education's Office for Civil Rights attempts to give schools guidance with regard to their legal obligation to respond to peer harassment,<sup>8</sup> it acknowledges that it is not authoritative in the Fifth Circuit after *Rowinsky* (nor, presumably, would it be controlling in the Eleventh Circuit after the *en banc* decision in this case),<sup>9</sup> and a number of courts have refused to grant it deference.<sup>10</sup> It is time for this Court

<sup>8</sup> See Office for Civil Rights, Dep't of Educ., *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997).

<sup>9</sup> *Id.* at 12,036.

<sup>10</sup> See *Smith v. Metro. Sch. Dist. Perry Township*, No. 95-3818, 1997 U.S. App. LEXIS 29085, at \*64 (7th Cir. Oct. 22, 1997) (refusing to defer to OCR's final policy guidance); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997) (refusing to defer to OCR's draft guidances on ground that government cannot modify past agreements with recipients of Title IX funds). But see *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 411 (5th Cir. 1996) (Dennis, J., dissenting) (urging great deference to OCR's draft policy guidances), *reh'g denied*, 106 F.3d 399 (5th Cir. 1997), and *cert. denied*, 117 S. Ct. 2434 (1997); *Londonderry*, 970 F. Supp. at 72 (deferring to OCR's final policy guidance); *Collier*, 956 F. Supp. at 1213 (deferring to OCR's practice of applying Title VII principles to Title IX peer harassment cases). As one Judge has observed:

Unfortunately, the Supreme Court has heretofore not been called upon to determine how much "more deference" than no deference we should apply when construing OCR policy guidelines. Thus, courts have seen fit to arbitrarily pick and choose



to step into the fray and clarify the legal standards governing Title IX peer sexual harassment claims.

**B. The Circuits Are Split on Whether Title VII Principles Should Guide Courts in Determining School Liability in Hostile Environment Cases Under Title IX.**

Taking their lead from this Court's decision in *Franklin*, 503 U.S. at 75, which cited Title VII authority in support of its ruling that a teacher's sexual harassment of a student constitutes intentional discrimination under Title IX, the First, Second, Sixth, Eighth and Ninth Circuits have invoked Title VII sexual harassment principles to define the contours of school liability under Title IX for subjecting students to a sexually hostile environment. See *Hot, Sexy, and Safer Prods., Inc.*, 68 F.3d at 540 (1st Cir.); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897-901 (1st Cir. 1988); *Kracunas v. Iona College*, 119 F.3d 80, 86-88 (2d Cir. 1997); *Murray*, 57 F.3d at 248-49 (2d Cir.); *Doe v. Claiborne County*, 103 F.3d 495, 514-15 (6th Cir. 1996); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996); *Oona*, 122 F.3d at 1210 (9th Cir.). Cf. *Seamons*, 84 F.3d at 1232-33 (purporting to apply Title VII framework to Title IX peer sexual harassment case, but departing from this framework by requiring the school's response to be on the basis of sex).

Drawing on Title VII principles, these Circuits have interpreted Title IX to require schools to respond appropriately to the sexual harassment of students if they knew or should have known of the harassment, whether the harasser is a student, see *Oona*, 122 F.3d at 1209-10; school employee, see *Claiborne*, 103 F.3d at 515; *Kinman*, 94 F.3d at 469; *Lipsett*, 864 F.2d at 899-901; or other per-

the level of deference they wish to implement in cases such as this one.

*Smith*, 1997 U.S. App. LEXIS 29085, at \*83 (Coffey, J., concurring) (citations omitted).

son, see *Hot, Sexy and Safer Prods., Inc.*, 68 F.3d at 540 (independent contractor); *Murray*, 57 F.3d at 249-50 (dental school patient).

In contrast to these courts, the Fifth, Seventh and Eleventh Circuits have refused to apply Title VII principles to determine school liability for hostile environment claims brought by students under Title IX. See *Smith v. Metro. Sch. Dist. Perry Township*, No. 95-3818, 1997 U.S. App. LEXIS 29085, at \*40 (7th Cir. Oct. 22, 1997); *id.* at \*75-\*81 (Coffey, J., concurring); *Davis* 120 F.3d at 1394 n.6, 1399 n.13; *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 655-58 (5th Cir. 1997); *Rowinsky*, 80 F.3d at 1011 & n.11.

In the Circuits that have rejected the application of Title VII principles to Title IX sexual harassment cases, a more restrictive standard governs school liability for sexual harassment under Title IX. See *Davis*, 120 F.3d at 1401 (refusing to recognize Title IX action based on school's response to peer sexual harassment); *Rosa H.*, 106 F.3d at 658-60 (requiring plaintiff in teacher-student sexual harassment claim prove that employee with supervisory power over teacher had actual knowledge, akin to Eighth Amendment deliberate indifference standard, and authority to take action that would end harassment, yet failed to act); *Smith*, 1997 U.S. App. at \*65-\*66 (same); *Rowinsky*, 80 F.3d at 1016 (requiring plaintiff in peer sexual harassment case to demonstrate that school responded to sexual harassment claims differently based on sex).

A large number of district courts also have struggled with the question of whether Title VII principles should guide school liability for hostile environment sexual harassment under Title IX, with conflicting results. While the majority of district courts that have spoken on the issue have borrowed Title VII principles to determine school liability in Title IX sexual harassment claims, see, e.g., *Nicole M.*, 964 F. Supp. at 1377-78 (peer harassment);

*Collier*, 956 F. Supp. at 1213 (same); *Franks*, 956 F. Supp. at 746-47 (same); *Petaluma*, 949 F. Supp. at 1421 (same); *Bosley*, 904 F. Supp. at 1020-25 (same); *Kadiki v. Virginia Commonwealth Univ.*, 892 F. Supp. 746, 753 (E.D. Va. 1995) (harassment by school employee); *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1521, 1526 (M.D. Ala. 1994) (same); *Hastings v. Hancock*, 842 F. Supp. 1315, 1318 (D. Kan. 1993) (same); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1290 (N.D. Cal. 1993) (same), several district courts have rejected Title VII principles in Title IX sexual harassment cases, *see, e.g., Howard v. Board of Educ.*, 876 F. Supp. 959, 974 (N.D. Ill. 1995) (teacher-student harassment); *Garza*, 914 F. Supp. at 1438 (peer harassment); *Floyd v. Waiters*, 831 F. Supp. 867, 876 (M.D. Ga. 1993) (harassment by school employee), and the remainder have applied Title VII principles selectively with some modification, *see, e.g., Londonderry*, 970 F. Supp. at 74-75 (rejecting Title VII constructive notice standard and requiring actual notice); *Wright*, 840 F. Supp. at 1419-20 (same); *Bruneau*, 935 F. Supp. at 171-77 (same); *Burrow*, 929 F. Supp. at 1204-05 (same); *Slaughter v. Waubensee Community College*, No. 94-C-2525, 1995 WL 578296, at \*3-\*4 (N.D. Ill. Sept. 29, 1995) (applying Title VII principles to teacher-student hostile environment claim, but rejecting Title VII agency principles in Title IX quid pro quo cases).

The split in the courts as to whether school liability for sexual harassment under Title IX should turn on the standards that have developed to govern employer liability for sexual harassment under Title VII goes to the heart of the dispute in this case. *Compare Davis*, 120 F.3d at 1399 n.13 (*en banc*) (refusing to apply Title VII standards to determine school liability for sexual harassment under Title IX), *with id.* at 1415-18 (Barkett, Hatchett, Kravitch and Henderson, JJ., dissenting) (arguing that Title VII principles should guide analysis of school liability

for sexual harassment under Title IX), *and Davis*, 74 F.3d at 1190-95 (panel decision) (applying Title VII principles to hold schools liable under Title IX for failing to respond to complaints of peer sexual harassment). This Court should grant the Petition to provide much-needed guidance to the lower courts as to the proper standard for determining school liability for sexual harassment under Title IX. *Cf. Smith*, 1997 U.S. App. LEXIS 29085, at \*111 (Rovner, J., dissenting) (stating that "[m]uch ink has already been spilled addressing the issue of the appropriate standard for institutional liability under Title IX," and that "the Supreme Court must ultimately resolve the division amongst the circuits").

## II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT.

The Eleventh Circuit has construed Title IX in a manner that is at odds with well-established precedents of this Court and frustrates Congress' intent to eliminate sex discrimination in federally funded education. The decision below relies on a constricted view of Title IX to conclude that the statute does not recognize a cause of action for peer sexual harassment, "no matter how egregious—or even criminal—the harassing discriminatory conduct may be, and no matter how cognizant of it supervisors may become." *Davis*, 120 F.3d at 1412 (Barkett, Hatchett, Kravitch and Henderson, JJ., dissenting). The Eleventh Circuit's decision contradicts this Court's rulings and its promises not to allow "federal moneys to be expended to support the intentional actions [Congress] sought by statute to proscribe" when it enacted Title IX. *Franklin*, 503 U.S. at 75.

### A. The Decision Below Contravenes This Court's Mandate To Read Title IX Broadly.

The Eleventh Circuit's cramped reading of Title IX conflicts with this Court's mandate "to accord [the stat-



ute] a sweep as broad as its language." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (citations omitted). Contrary to this Court's precedents, the Eleventh Circuit has concluded that Title IX's expansive prohibition against sex discrimination is not broad enough to encompass peer hostile environment sexual harassment, a form of sex discrimination.<sup>11</sup> The Eleventh Circuit reached this result through an over-reliance on the absence of explicit language banning student-to-student sexual harassment in Title IX's statutory scheme or legislative history, an approach this Court repeatedly has eschewed.

Time and again, this Court has construed Title IX broadly, recognizing that doing so is essential to realize Congress' goal of eradicating sex discrimination in federally funded education. Accordingly, even in the absence of explicit statutory language, this Court has interpreted Title IX to reach employment discrimination, *North Haven*, 456 U.S. at 521, 530; provide a private right of action, *Cannon v. University of Chicago*, 441 U.S. 677 (1979); and provide compensatory damages for violations, *Franklin*, 503 U.S. at 76. Despite Title IX's silence regarding each issue, this Court has concluded that the breadth of Title IX's proscriptive language, coupled with Congress' intent to eliminate sex discrimination in education, requires an interpretation that furthers those goals. See, e.g., *Cannon*, 441 U.S. at 709 ("Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination."). In contrast, the Eleventh Circuit interpreted Title IX's broad language

<sup>11</sup> See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); see also 29 C.F.R. § 1604.11(d) (Equal Employment Opportunity Commission Guideline stating that an employer is responsible under Title VII for sexual harassment between fellow employees "where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action").

to restrict liability and release educational institutions from any obligation to address sexually hostile environments created by students.

#### B. The Decision Below Is at Odds With *Franklin*.

The Eleventh Circuit's decision also conflicts with this Court's holding in *Franklin* upholding an action for damages under Title IX for sexual harassment. The decision below rejects this Court's use of Title VII principles to analyze Title IX sexual harassment claims and misapprehends this Court's conclusion that allowing sexually hostile environments to persist establishes liability for intentional discrimination. *Franklin*, 503 U.S. at 75.

Just as in the case at bar, the petitioner in *Franklin*, a student, sought relief for a sexually hostile environment of which school officials were aware, but refused to remedy. *Id.* at 63-64. This Court concluded that a cause of action for teacher-to-student sexual harassment exists under Title IX and that compensatory damages are available under the statute. *Id.* at 75. In reaching this holding, this Court relied on Title VII principles to explain that sexual harassment is intentional discrimination actionable under Title IX:

Th[e] notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex."

*Id.* at 74-75. Significantly, this Court relied on *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986), where it first recognized hostile environment sexual harassment as a form of sex discrimination prohibited by Title VII to support its analysis, demonstrating that the well-established principles developed under that statute to examine

sexual harassment claims also apply to this form of sex discrimination in the Title IX context.

The *Davis* decision departs significantly from this Court's ruling in *Franklin* in many respects. Contrary to this Court's decision, the Eleventh Circuit construed Title IX's silence regarding sexual harassment to preclude imposing any obligation whatsoever upon federally funded educational institutions to address student-to-student sexual harassment. *Davis*, 120 F.3d at 1397. Further contravening this Court, the Eleventh Circuit refused to apply Title VII principles to its analysis, concluding that schools, unlike employers, had no obligation to provide students with a nondiscriminatory environment. *See id.* at 1400 n.13. In addition, failing to recognize that sexual harassment is intentional discrimination, the Eleventh Circuit again departed from *Franklin* to hold that Title IX, as Spending Clause legislation,<sup>12</sup> had not given schools sufficient notice of their obligations under the statute to prohibit such discrimination. *Id.* at 1406.

The Eleventh Circuit's conclusion that Title IX does not require federally funded schools to remedy student-created sexually hostile environments simply cannot be squared with decisions of this Court. As *Franklin* makes plain, Title IX's broad purpose to eradicate sex discrimination in federally funded education requires recipients to maintain environments free from such discrimination. Thus, under this Court's precedents, Title IX mandates that schools take steps to end sexual harassment when they know or should know that it is occurring. The Eleventh Circuit's ruling departs from this authority, enabling federally funded schools to allow this pernicious

<sup>12</sup> As in *Franklin*, because sexual harassment is intentional discrimination, this Court need not decide whether Title IX was enacted pursuant to the Spending Clause, Section Five of the Fourteenth Amendment, or both to decide whether Title IX requires schools to remedy a sexually hostile environment created by students. *Franklin*, 503 U.S. at 75 n.8.

form of sex discrimination to interfere with students' educational experiences. This Court should grant the Petition to correct the Eleventh Circuit's departure from this Court's authority.

### CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARCIA D. GREENBERGER  
VERNA L. WILLIAMS \*  
DEBORAH L. BRAKE  
NEENA CHAUDHRY  
NATIONAL WOMEN'S LAW CENTER  
11 Dupont Circle, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 588-5180  
*Attorneys for Petitioner*

\* Counsel of Record

November 19, 1997



## **APPENDICES**

1a

APPENDIX A

[Filed Aug. 21, 1997]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

No. 94-9121

---

D.C. Docket No. 94-CV-140-4MAC(WDO)

AURELIA DAVIS,  
as Next Friend of LaShonda D.,  
*Plaintiff-Appellant,*

versus

MONROE COUNTY BOARD OF EDUCATION, *et al.*,  
*Defendants-Appellees.*

---

Appeal from the United States District Court  
for the Middle District of Georgia

---

(August 21, 1997)

Before HATCHETT, Chief Judge, TJOFLAT, ED-  
MONDSON, COX, BIRCH, DUBINA, BLACK,  
CARNES and BARKETT, Circuit Judges,\* and

---

\* Judge R. Lanier Anderson recused himself and did not participate  
in this decision.



KRAVITCH \*\* and HENDERSON, Senior Circuit Judges.

TJOFLAT, Circuit Judge:

Appellant, Aurelia Davis, brought this suit against the Board of Education of Monroe County, Georgia, (the "Board") and two school officials, Charles Dumas and Bill Querry, on behalf of her daughter, LaShonda Davis. The complaint alleged that the defendants violated Section 901 of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, 373 (1972) (codified as amended at 20 U.S.C. § 1681 (1994)) ("Title IX"), and 42 U.S.C. § 1983<sup>1</sup> by failing to prevent a student at Hubbard Elementary School ("Hubbard") from sexually harassing LaShonda while she was a student there. Appellant separately alleged that the defendants discriminated against LaShonda on the basis of race in violation of 42 U.S.C. § 1981.<sup>2</sup> Appellant sought injunctive relief and \$500,000 in compensatory and punitive damages.

\*\* Senior Judge Phyllis A. Kravitch, who was a member of the en banc court which heard oral argument in this case, took senior status on January 1, 1997, and has elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

<sup>1</sup> This section provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . ." 42 U.S.C. § 1983 (1994).

<sup>2</sup> Davis actually alleged that the named defendants discriminated on the basis of race in violation of "the Education Act of 1972 and the Civil Rights Act of 1991." Davis was apparently referring to the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972), and the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). The former act, however, does not address racial discrimination in education, and the latter act does not provide a cause of action for racial discrimination in education. The district court construed this portion of the complaint to allege a violation of 42 U.S.C. § 1981, which does provide a cause of action against certain types of racial discrimination.

The district court dismissed appellants complaint in its entirety for failure to state a claim upon which relief can be granted. See *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 368 (M.D. Ga. 1994); see also Fed. R. Civ. P. 12(b)(6). Appellant appealed the district court's dismissal of her Title IX claim against the Board,<sup>3</sup> arguing that a school board can be held liable under Title IX for its failure to prevent sexual harassment among students. On appeal, a divided three-judge panel reinstated her Title IX claim against the Board. See *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1195 (11th Cir. 1996). At the Board's request, we granted rehearing en banc to consider appellant's Title

<sup>3</sup> Davis did not appeal the district court's dismissal of her Title IX claim with regard to individual defendants Dumas and Querry. Davis similarly did not appeal the district court's dismissal of her § 1981 claim. Therefore, we do not consider these claims.

With regard to Davis' § 1983 claim, the complaint seemed to allege that the defendants were liable under this provision solely because they violated Title IX. Davis, however, apparently argued before the district court that the defendants were liable under § 1983 for infringing LaShonda's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The district court dismissed this implied claim under Rule 12(b)(6). See *Aurelia D.*, 862 F. Supp. at 366.

Davis did not appeal the dismissal of her § 1983 claim to the extent it was based on the defendants' alleged violation of Title IX. Accordingly, that claim is not before us. She did, however, appeal the dismissal of her § 1983 claim to the extent it was based on the defendants' alleged violation of the Due Process Clause. In addition, Davis argued for the first time before the three-judge panel that the same § 1983 claim encompassed a violation of the Equal Protection Clause of the Fourteenth Amendment.

The panel rejected Davis' due-process and equal-protection arguments and affirmed the dismissal of her steadily expanding § 1983 claim under 11th Cir. R. 36-1. See *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1188 (1996). Davis did not petition the court to rehear this ruling en banc, and we see no reason to disturb the panel's decision *sua sponte*. We therefore do not consider Davis' various § 1983 claims. In sum, we address only Davis' Title IX claim against the Board.

IX claim,<sup>4</sup> and we now affirm the district court's dismissal of this claim.

I.

A.

We review *de novo* the district court's dismissal of appellant's complaint for failure to state a claim upon which relief can be granted. See *McKusick v. City of Melbourne*, 96 F.3d 478, 482 (11th Cir. 1996). To this end, we take as true the allegations appellant has set forth in her complaint and examine whether those allegations describe an injury for which the law provides relief. See *Welch v. Laney*, 57 F.3d 1004, 1008 (11th Cir. 1995). We construe appellant's allegations liberally because the issue is not whether appellant will ultimately prevail but whether she is entitled to offer evidence to support her claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974). We begin by describing the allegations contained in appellant's complaint.

B.

LaShonda Davis was enrolled as a fifth-grade student at Hubbard during the 1992-1993 school year. During that school year, Bill Querry was the principal of Hubbard, and Diane Fort, Joyce Pippin, and Whit Maples were teachers at the school. The complaint alleges that the Board administered federally funded educational programs at Hubbard and supervised the school's employees, including Principal Querry and Teachers Fort, Pippin, and Maples.

According to the complaint, a fifth-grade student named "G.F." was in several of LaShonda's classes and initially was assigned to the seat next to LaShonda in Fort's classroom. On December 17, 1992, while in Fort's classroom,

<sup>4</sup> See *Davis v. Monroe County Bd. of Educ.*, 91 F.3d 1418 (11th Cir. 1996). Granting rehearing en banc vacated the panel opinion by operation of law. 11th Cir. R. 35-11.

G.F. allegedly tried to touch LaShonda's breasts and vaginal area. G.F. also allegedly directed vulgarities at LaShonda, such as "I want to get in bed with you" and "I want to feel your boobs." LaShonda complained to Fort. After school that day, LaShonda also told her mother, the appellant, about G.F.'s behavior. The complaint states that G.F. engaged in similar (although unspecified) conduct on or about January 4, 1993,<sup>5</sup> and again on January 30, 1993. LaShonda allegedly reported both incidents to Fort and to appellant. After one of these first three incidents, appellant called Fort, who told appellant in the course of their conversation that Principal Querry knew about one of the incidents.

G.F.'s misconduct continued. On February 3, 1993, G.F. allegedly placed a door-stop in his pants and behaved in a sexually suggestive manner toward LaShonda during their physical education class. LaShonda reported this incident to Maples, who was the physical education teacher. On February 10, 1993, G.F. engaged in unspecified conduct similar to that of the December 17 incident in the classroom of Pippin, another of LaShonda's teachers. LaShonda notified Pippin of G.F.'s behavior and later told appellant, who then called Pippin to discuss the incident. On March 1, 1993, G.F. directed more unspecified, offensive conduct toward LaShonda during physical education class. LaShonda reported G.F. to Maples and Pippin. An unidentified teacher allegedly told LaShonda that Principal Querry was not ready to listen to her complaint about G.F.

At some point around March 17, 1993, Fort allowed LaShonda to change assigned seats away from G.F. G.F.,

<sup>5</sup> The complaint actually alleges that this second instance of harassment occurred "on or about January 2, 1993." We note that January 2, 1993 was a Saturday. Presumably, there was no school on Saturday, so G.F. could not have sexually harassed LaShonda at Hubbard on that day. Friday, January 1, 1993, was a holiday. Accordingly, we assume for appellant's benefit that the alleged harassment occurred on or about January 4, 1993.



however, persisted in his unwelcome attentions. On April 12, 1993, he rubbed his body against LaShonda in a manner she considered sexually suggestive; this incident occurred in the hallway on the way to lunch. LaShonda again complained to Fort.

Lastly, on May 19, 1993, LaShonda complained to appellant after school about more unspecified behavior by G.F. Appellant and LaShonda then paid a visit to Principal Querry to discuss G.F.'s conduct. At this meeting, Querry asked LaShonda why no other students had complained about G.F. During this meeting, Querry also told appellant, "I guess I'll have to threaten [G.F.] a little bit harder." On the same day, May 19, G.F. was charged with sexual battery, a charge which he apparently did not deny. The complaint does not tell us who summoned the police.

In all, the complaint describes eight separate instances of sexual harassment by G.F. These eight instances of alleged harassment occurred, on average, once every twenty-two days over a six-month period. Three instances occurred in Fort's classroom; two occurred in Maple's physical education class; one occurred in Pippin's classroom; one occurred in a school hallway; and one occurred in an unspecified location. LaShonda reported four instances of alleged harassment to Fort, two to Maples, and two to Pippin. LaShonda reported the final instance of harassment, the May 19 incident, to appellant and Querry. The complaint does not allege that any faculty member knew of more than four instances of harassment, and the complaint indicates that Principal Querry learned of only one instance of harassment before his meeting with appellant and LaShonda on May 19.

The complaint does not state what action each of the teachers took upon being informed by LaShonda of G.F.'s demeaning conduct. We assume for appellant's benefit that the teachers took no action other than Fort's apparent notification of Principal Querry after one of the first

three instances of alleged harassment and Fort's decision around March 17, 1993, to move LaShonda's assigned seat away from that of G.F. We will also accept as true that Principal Querry took no measures against G.F. other than threatening him with disciplinary action at some point before his May 19 meeting with appellant and her daughter. For example, we assume for appellant's benefit that someone other than the school staff instigated the prosecution of G.F.

Appellant claims that LaShonda suffered mental anguish because of G.F.'s behavior. As indicia of this emotional trauma, the complaint states that LaShonda's grades dropped during the 1992-1993 school year and that LaShonda wrote a suicide note in April 1993. Based on the above allegations, appellant contends that "[t]he deliberate indifference by Defendants to the unwelcomed [sic] sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abuse [sic] school environment in violation of Title IX." We therefore consider whether Title IX allows a claim against a school board based on a school official's failure to remedy a known hostile environment<sup>6</sup> caused by the sexual harassment of one student by another ("student-student sexual harassment").

<sup>6</sup> The term "hostile environment" sexual harassment originated in employment litigation under § 703 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964) (codified at 42 U.S.C. § 2000e-2 (1994)) ("Title VII"). Hostile-environment sexual harassment occurs whenever an employee's speech or conduct creates an atmosphere that is sufficiently severe or pervasive to alter another employee's working conditions. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22, 114 S. Ct. 367, 370-71, 126 L. Ed. 2d 295 (1993). As discussed *infra*, n.13, we conclude that Title VII standards of liability, borrowed from the employment context, do not control our resolution of this case. Nevertheless, for purposes of our discussion of appellant's claim, we construe the complaint to allege that G.F.'s speech or conduct created an atmosphere that was sufficiently hostile or abusive to alter the conditions of LaShonda's learning environment.

## II.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (1994). Although nothing in the plain language of Title IX speaks to the issue of student-student sexual harassment, several district courts have held that Title IX allows a student to sue a school board for failing to prevent hostile-environment sexual harassment by another student. See *Doe v. Londonderry Sch. Dist.*, No. 95-469-JD, <http://lw.bna.com/#0708> (D. N.H. June 13, 1997); *Nicole M. v. Martinez Unified Sch. Dist.*, No. C-93-4531 MHP, 1997 WL 193919, at \*8 (N.D. Cal. Apr. 15, 1997); *Collier v. William Penn Sch. Dist.*, 956 F. Supp. 1209, 1213-14 (E.D. Pa. 1997); *Bruneau By and Through Schofield v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 172 (N.D.N.Y. 1996); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993), *rev'd on other grounds*, 54 F.3d 1447 (9th Cir. 1995); *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193, 1205 (N.D. Iowa 1996); *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1419-20 (N.D. Iowa 1996); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1023 (W.D. Mo. 1995); *Oona R.-S. v. Santa Rosa City Schs.*, 890 F. Supp. 1452, 1469 (N.D. Cal. 1995); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1293 (N.D. Cal. 1993). But see *Garza v. Galena Park Indep. Sch. Dist.*, 914 F. Supp. 1437, 1438 (S.D. Tex. 1994) ("[A] student cannot bring a hostile environment claim under Title IX.").

The courts of appeals, however, have been less enthusiastic. The Fifth Circuit has held that no cause of action exists where a school board merely knew or should have known of peer sexual harassment and failed to act. See *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir.), *cert. denied*, — U.S. —, 117 S. Ct.

165, 136 L. Ed. 2d 108 (1996). Other circuits have resolved complaints of student-student sexual harassment without deciding whether a cause of action exists under Title IX for this alleged harm. See, e.g., *Seamons v. Snow*, 84 F.3d 1226, 1232-33 (10th Cir. 1996) (holding that the plaintiff failed to state a valid claim for student-student sexual harassment because he failed to allege that the harassment in question was on account of his sex); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 250 (2nd Cir. 1995) (holding that, even if Title IX created a private cause of action for sexual harassment by a non-employee of the school, plaintiff failed to allege that school officials knew or should have known of the harassment); *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1994) (holding that a defendant school counselor was entitled to qualified immunity against a claim that he failed to respond to known sexual harassment of the plaintiff by other students).

The Supreme Court has not squarely addressed the issue of student-student sexual harassment. In general, the Court has allowed private plaintiffs to proceed under Title IX only in cases that allege intentional gender discrimination by the administrators of educational institutions. According to the Court, plaintiffs can state a claim under Title IX by alleging that a federally funded educational institution, acting through its employees, intentionally subjected them to discrimination in its educational programs or activities. See *Cannon v. University of Chicago*, 441 U.S. 677, 709, 99 S. Ct. 1946, 1964, 60 L. Ed. 2d 560 (1979). For example, where a teacher engaged a student in sexually oriented conversations, solicited dates from her, forcibly kissed her on the mouth, and thrice removed her from another class in order to engage in coercive sexual intercourse with her in a private office at the school, the Court found that the school board could be held liable for his actions. See *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 63-64, 76, 112 S. Ct. 1028, 1031, 1038, 117 L. Ed. 2d 208 (1992).



Neither the Supreme Court nor this court has ever found, however, that a school board can be held liable for failing to prevent *non-employees* from discriminating against students on the basis of sex. Appellant does not allege that any employee of the Board intentionally discriminated against LaShonda by personally participating in G.F.'s offensive conduct toward her. Rather, appellant alleges that the Board violated Title IX by failing adequately to respond to LaShonda's complaints. Neither the Supreme Court nor this court has considered whether a Title IX plaintiff can proceed under this theory. In short, by seeking direct liability of the Board for the wrongdoing of a student, appellant argues for an extension of liability under Title IX. We examine the legislative history of Title IX to determine whether Congress intended this provision to reach appellant's allegations.

#### A.

The provision now known as Title IX emerged from a flurry of bills regarding public education. In June and July 1970, the House Subcommittee on Education of the House Committee on Education and Labor, under the leadership of Representative Edith Green, held hearings on gender discrimination in federally funded educational programs. *See Discrimination against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) [hereinafter *House Hearings*]. None of the testimony before Representative Green's subcommittee concerned student-student sexual harassment or related issues, such as school discipline. Instead, the subcommittee's work focused on eliminating gender discrimination in school admissions and in the employment decisions of school administrators.

By 1970, section 703 of the Civil Rights Act of 1964 already prohibited gender discrimination in employment. *See Civil Rights Act of 1964*, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (1964) (codified at 42 U.S.C. § 2000e-2

(1994)) ("Title VII").<sup>7</sup> Title VII, however, did not apply to educational institutions. *See* § 702, 78 Stat. at 255 (codified as amended at 42 U.S.C. § 2000e-1 (1994)). Similarly, section 601 of the Civil Rights Act prohibited racial discrimination by all recipients of federal funding. *See* § 601, 78 Stat. at 252 (codified at 42 U.S.C. § 2000d (1994)) ("Title VI").<sup>8</sup> Title VI did not ban gender discrimination by recipients of federal funding.

To fill this gap in antidiscrimination legislation, the subcommittee drafted a proposed amendment to H.R. 16098, 91st Cong. (1970). This amendment would have applied to schools the non-discrimination requirements of Title VII and added "sex" to the types of discrimination banned by Title VI. *See House Hearings, supra*, at 1. In other words, the subcommittee's amendment was designed to bridge the gap between Title VII and Title VI. The amendment, however, never reached the House floor. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523 n.13, 102 S. Ct. 1912, 1919, n.13, 72 L. Ed. 2d 299 (1982).

On April 6, 1971, a new education bill was introduced in the House. *See* H.R. 7248, 92nd Cong. (1971). This bill contained a provision similar to the amendment proposed by Representative Green's subcommittee nearly one year earlier. Title X of H.R. 7248 prohibited gender discrimination in any education program or activity receiving federal financial support. H.R. Rep. No. 92-554,

<sup>7</sup> Title VII states, "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (1994).

<sup>8</sup> Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

at 108 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2511-12. The House report on H.R. 7248 described this provision as a response to discriminatory admissions policies and employment practices at federally funded schools. *See id.* Once again, neither the House report nor the underlying testimony discussed student-student sexual harassment.

While the House bill remained in committee, the Senate was considering a similar education bill. *See* S. 659, 92nd Cong. (1971). The Senate bill emerged from the Senate Committee on Labor and Public Welfare on August 3, 1971, without any antidiscrimination provision at all. Consequently, on August 5, 1971, Senator Birch Bayh introduced on the Senate floor an amendment to the committee's version of S. 659. *See* 117 Cong. Rec. 30,156. (1971). His amendment, like the House provision drafted by Representative Green's subcommittee, extended the antidiscrimination provisions of the Civil Rights Act of 1964 to gender discrimination by federally funded "institutions of higher learning."<sup>9</sup> *See id.* at 30,155. In defending his amendment, Senator Bayh did not discuss student-student sexual harassment, nor did he discuss school discipline. He focused on gender discrimination in school admissions and employment opportunities for female teachers. *See id.* at 30,155-56. In any event, the Senate rejected Bayh's amendment as non-germane, *id.* at 30,415, and the Senate passed S. 659 on August 6, 1971, without an antidiscrimination provision.

On November 3, 1971, the House began consideration of S. 659, as passed by the Senate. The House "amended" the Senate bill by striking virtually the entire contents of S. 659 and replacing it with the contents of H.R. 7248,

<sup>9</sup> Senator Bayh's first amendment provided, "No person . . . shall, on the ground of sex, . . . be subject to discrimination under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance for any education program or activity." 117 Cong. Rec. at 30,156.

including the antidiscrimination provision. *See* S. Rep. No. 92-604, at 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2595, 2595. The House made this change without official comment and passed its version of S. 659 on November 4, 1971. *See* 117 Cong. Rec. at 30,882.

On November 24, 1971, the Senate, by unanimous consent, referred the House version of S. 659 back to the Committee on Labor and Public Welfare, which proceeded to amend the House version to conform to the original Senate version. *See* S. Rep. No. 92-604, at 1-2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2595, 2595-96. Once again, the committee did not discuss gender discrimination at all, much less sexual harassment among students. On February 7, 1972, the Senate committee sent its own version of S. 659 back to the floor of the Senate. *See* 118 Cong. Rec. 2806 (1972).

Once the bill returned to the Senate floor, Senator Bayh again introduced an amendment to add an antidiscrimination provision.<sup>10</sup> *See id.* at 5802-03. Bayh's proposal was intended to "close[] loopholes in existing legislation relating to general education programs and employment resulting from those programs." *Id.* at 5803. In support of his amendment, Senator Bayh stated,

we are dealing with three basically different types of discrimination here[:] . . . discrimination in admission to an institution, discrimination of [sic] available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of the faculty or whatever.

*Id.* at 5812. To counter these problems, Senator Bayh proposed a provision he thought would "cover such crucial

<sup>10</sup> Senator Bayh's second amendment stated, "No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 118 Cong. Rec. at 5803.



aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions." *Id.* at 5803. Yet again, no senator mentioned student-student sexual harassment or school discipline.

The Senate adopted Bayh's second amendment on February 28, 1972. *See* 118 Cong. Rec. at 5815 (1972). Because of irreconcilable differences between the House and Senate versions of S. 659, both Houses referred the bill to a conference committee. *See* S. Conf. Rept. No. 92-798, at 1 (1972). The conference committee reported out a joint bill containing the antidiscrimination measure now known as Title IX. The conference bill passed both Houses and was signed into law on June 23, 1972. *See* 118 Cong. Rec. at 22,702. Throughout this long legislative history, the drafters of Title IX never discussed student-student sexual harassment or the related issue of school discipline.

#### B.

While the legislative history of Title IX does not indicate that Congress authorized a private cause of action for student-student sexual harassment, the legislative history does show that Title IX was enacted under the Spending Clause of Article I. *See* U.S. Const. art. I, § 8, cl. 1.<sup>11</sup> When Congress conditions the receipt of federal funding upon a recipient's compliance with federal statutory directives, Congress is acting pursuant to its spending power. *See Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598-99, 103 S. Ct. 3221, 3230-31, 77 L. Ed. 2d 866 (1983) (opinion of White, J.). The legislative history of Title IX indicates that Congress intended to impose upon recipients of federal educational assistance a requirement of non-discrimination on the basis of sex. The Spending Clause authorized Congress to impose this condition.

<sup>11</sup> Section 8 of Article I provides, in part, that "[t]he Congress shall have [the] Power To . . . provide for the . . . general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1.

Representative Green put it succinctly: "If we are writing the law, I would say that any institution could be all men or all women, but my own feeling is that they do it with their own funds and not taxpayers' funds." *Higher Education Amendments of 1971: Hearings on H.R. 32, H.R. 5191, H.R. 5192, H.R. 5193, and H.R. 7248 Before the Special Subcomm. on Education of the House Comm. on Education and Labor, 92nd Cong., 1st Sess.* 581 (1971). Representative Green also quoted with approval President Nixon, who had stated, "Neither the President nor the Congress nor the conscience of the Nation can permit money which comes from all the people to be used in a way which discriminates against some of the people." 117 Cong. Rec. at 39,257 (1971) (statement of Rep. Green). To Senator Bayh, the reach of Title IX was clearly restricted to federally funded institutions. *See* 118 Cong. Rec. at 5812. In support of Title IX, Senator McGovern stated, "I urge my colleagues to take every opportunity to prohibit Federal funding of sex discrimination." 117 Cong. Rec. at 30,158. This legislative history clearly shows that Congress intended Title IX to be a "typical 'contractual' spending-power provision." *Guardians Ass'n*, 463 U.S. at 599, 103 S. Ct. at 3231.

<sup>12</sup> The Supreme Court has left open the question of whether Title IX was enacted under the Spending Clause. *See Franklin*, 503 U.S. at 75 n.8, 112 S. Ct. at 1038 n.8. One could argue, as did the petitioner in *Franklin*, that Title IX was enacted under § 5 of the Fourteenth Amendment, which provides Congress with the authority to enact legislation preventing states from "deny[ing] to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4.

The Equal Protection Clause, however, only protects against action by state-sponsored entities. *See Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S. Ct. 836, 842, 92 L. Ed. 1161 (1948). Federal funding does not make a public school a state actor. *See Blackburn v. Fisk University*, 443 F.2d 121, 123 (6th Cir. 1971). Thus, if Title IX had been enacted under the Fourteenth Amendment, then the antidiscrimination provision of Title IX would not reach federally funded schools that were not state actors. We think that the plain language of Title IX commands a different result: no

In addition to these indications of congressional intent, similarities between Title IX and Title VI indicate that Title IX was enacted pursuant to the Spending Clause. As noted above, Title VI prohibits recipients of federal funding from engaging in race discrimination. In *Guardians Association v. Civil Service Commission*, at least six members of the Supreme Court agreed that Title VI was enacted under the Spending Clause. See 463 U.S. at 598-99, 629, 638, 103 S. Ct. at 3230-31, 3247, 3251; see also *Lau v. Nichols*, 414 U.S. 563, 568-69, 94 S. Ct. 786, 789, 39 L. Ed. 2d 1 (1974) (describing how a school district "contractually agreed to comply with title VI" when it accepted federal funding).

As Justice White quoted from the legislative history of Title VI, "It is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to fix the terms on which Federal funds shall be disbursed." *Guardians Ass'n*, 463 U.S. at 599, 103 S. Ct. at 3231 (quoting 110 Cong. Rec. 6546 (1964) (quoting *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143, 67 S. Ct. 544, 553, 91 L. Ed. 794 (1947)) (internal quotation marks omitted). Justice White summed up the legislative philosophy behind Title VI: "Stop the discrimination, get the money; continue the discrimination, do not get the money." *Guardians Ass'n*, 463 U.S. at 599, 103 S. Ct. at 3231 (quoting 110 Cong. Rec. at 1542) (internal quotation marks omitted). This interpretation matches the plain language of Title VI, which conditions the disbursement of federal funds on the recipient's agreement not to discriminate on the basis of race. See 42 U.S.C. § 2000d (1994).

The language of Title IX is virtually identical to the language of Title VI. See 117 Cong. Rec. at 30,156

school that receives federal funding may discriminate on the basis of gender. Therefore, we conclude that Title IX was enacted pursuant to a power that can reach non-state actors as well as state actors—the spending power. See *Rowinsky*, 80 F.3d at 1013 n.14.

(statement of Sen. Bayh). The only differences are the substitution of the words "on the basis of sex" for the words "on the ground of race, color, or national origin" and the insertion of the word "educational" in front of the words "program or activity." See *Grove City College v. Bell*, 465 U.S. 555, 586, 104 S. Ct. 1211, 1228, 79 L. Ed. 2d 516 (1984) (Brennan, J., concurring in part and dissenting in part); compare 42 U.S.C. § 2000d with 20 U.S.C. § 1681(a). Not surprisingly, the Supreme Court has found that "Title IX was patterned after Title VI." *Cannon*, 441 U.S. at 694, 99 S. Ct. at 1956.

The Supreme Court's study of the legislative history of Title IX has led it to conclude that the drafters of Title IX intended that courts interpret it in the same way they have interpreted Title VI. *Id.* at 696, 99 S. Ct. at 1957. Therefore, we find that Title IX, like Title VI, was enacted under Congress' power to spend for the general welfare of the United States. See *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997); *Lieberman v. University of Chicago*, 660 F.2d 1185, 1187 (7th Cir. 1981), *cert. denied*, 456 U.S. 937, 102 S. Ct. 1993, 72 L. Ed. 2d 456 (1982). We now consider the implications of this finding.

### III.

#### A.

When Congress enacts legislation pursuant to the Spending Clause, it in effect offers to form a contract with potential recipients of federal funding. See *Pennhurst v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 1540, 67 L. Ed. 2d 694 (1981). Recipients who accept federal monies also accept the conditions Congress has attached to the offer. See *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 2795-96, 97 L. Ed. 2d 171 (1987). A prospective recipient is free to decline a grant of federal funding. See *New York v. United States*, 505 U.S. 144, 168, 112 S. Ct. 2408, 2424, 120 L. Ed. 2d



120 (1992). Similarly, a current recipient may withdraw from a federal program and decline further funding if it so chooses. See *Guardians Ass'n*, 463 U.S. at 596, 103 S. Ct. at 3229. The freedom of recipients to decline prospectively or to terminate retrospectively a grant of federal funding ensures that they will remain responsive to the preferences of their local constituents. See *New York*, 505 U.S. at 168, 112 S. Ct. at 2424.

To ensure the voluntariness of participation in federal programs, the Supreme Court has required Congress to give potential recipients unambiguous notice of the conclusions they are assuming when they accept federal funding. *Pennhurst*, 451 U.S. at 17, 101 S. Ct. at 1540. A spending power provision must read like a prospectus and give funding recipients a clear signal of what they are buying. The Court has explained, "By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* With regard to the case at hand, "Congress must be unambiguous in expressing to school districts the conditions it has attached to the receipt of federal funds." *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 398 (5th Cir. 1996), cert. denied, — U.S. —, — S. Ct. —, — L. Ed. 2d — (1997). We therefore consider whether Congress gave the Board unambiguous notice that it could be held liable for failing to stop G.F.'s harassment of LaShonda.

Appellant and the United States Department of Justice, as *amicus curiae*, argue that Title IX gave the Board clear notice of this form of liability. Appellant points to the Supreme Court's decision in *Franklin*. In *Franklin*, the Court suggested that "th[e] notice problem does not arise in a case . . . in which intentional discrimination is alleged." 503 U.S. at 74-75, 112 S. Ct. at 1037. The Court stated that the plain language of Title IX imposes on schools a duty not to discriminate on the basis of sex, and when a school teacher sexually harasses a student,

that teacher is discriminating on the basis of sex. *Id.* at 75, 112 S. Ct. at 1037. Appellant argues that a school employee is intentionally discriminating on the basis of sex when he or she fails to prevent one student from sexually harassing another.<sup>13</sup> Hence, appellant asserts that the

<sup>13</sup> Appellant and the Department of Justice argue that we should use Title VII standards of liability to interpret Title IX. An employer is directly liable under Title VII if it is deliberately indifferent to peer sexual harassment in the workplace. See *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1538-39 (11th Cir. 1997) (en banc). Appellant argues that a school should also be liable if it is deliberately indifferent to peer sexual harassment at school.

The superficial appeal of this argument has attracted the adherence of a few courts. See, e.g., *Bruneau*, 935 F. Supp. at 170-71. These courts have applied Title VII standards of liability to Title IX cases simply because (1) Title VII and Title IX both deal with sexual harassment and (2) the Supreme Court once cited a Title VII case in discussing liability under Title IX, see generally *Franklin*, 503 U.S. at 75, 112 S. Ct. at 1037 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986)). See *Bruneau*, 935 F. Supp. at 170-71.

However, the Supreme Court has never discussed student-student sexual harassment or generally applied Title VII jurisprudence to Title IX cases. Perhaps for this reason, some courts that have imposed Title VII-type liability under Title IX have refused—without much explanation—to apply *all* of Title VII jurisprudence to Title IX. See, e.g., *Bruneau*, 935 F. Supp. at 169-70 ("[T]he Court cautions that by holding that Title VII legal standards apply to an analysis of Title IX claims, the Court is *not* holding that the entirety of Title VII jurisprudence must be applied to Title IX."). Other courts have altogether refused to apply Title VII jurisprudence to Title IX. See, e.g., *Rosa H.*, 106 F.3d at 656 ("*Franklin*'s single citation to *Meritor Savings* to support the Court's conclusion that sexual harassment is sex discrimination does not by itself justify the importation of other aspects of Title VII law into the Title IX context.").

We decline appellant's invitation to use Title VII standards of liability to resolve this Title IX case. See *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1450-51 (9th Cir. 1994) First, Title VII and Title IX are worded differently. If Congress wished Title IX to be interpreted like the earlier-enacted Title VII, Congress would

school board here had sufficient notice, for purposes of the Spending Clause, that it could be held liable. We disagree.<sup>14</sup>

have written Title IX to read like Title VII. Congress did not. Interpreting the plain language of different statutes does not automatically produce the same result simply because both statutes proscribe similar behavior.

Second, Title VII was enacted under the far-reaching Commerce Clause and § 5 of the Fourteenth Amendment. See *E.E.O.C. v. Pacific Press Pub'g Ass'n*, 676 F.2d 1272, 1279 n.10 (9th Cir. 1982). Title IX was not, and consequently its reach is narrower.

Third, the exposition of liability under Title VII depends upon agency principles. See *Meritor*, 477 U.S. at 72, 106 S. Ct. at 2408; *Faragher*, 111 F.3d at 1534-36. Agency principles are useless in discussing liability for student-student harassment under Title IX, because students are not agents of the school board. See generally Restatement (Second) of Agency § 1 (1958) (defining an agency relationship as one in which the principal consents to representation by the agent and the agent consents to control by the principal). Therefore, even if employers owe to employees some sort of non-delegable duty to eliminate peer harassment in the workplace, see generally *id.* § 492 (discussing employers' duty to provide reasonably safe working conditions for their employees), schools owe to students no comparable duty. In short, Title VII jurisprudence does not control the outcome of this case.

<sup>14</sup> We note that neither this court nor the Supreme Court in *Franklin* fully addressed the question of whether a student can state a claim under Title IX for sexual harassment by a teacher—much less whether a student can state a claim under Title IX for sexual harassment by another student.

The defendant school board in *Franklin* successfully moved the district court to dismiss Franklin's Title IX suit on the ground that "compensatory relief is unavailable for violations of Title IX," a holding which this court affirmed. *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 618 (11th Cir. 1990). The school board apparently conceded on appeal that the plaintiff's allegations stated a claim under Title IX. See *id.* at 619.

Similarly, the school board conceded before the Supreme Court that teacher-student sexual harassment violated Title IX. See Brief for Respondents at 2, 7, *Franklin v. Gwinnett County Sch. Dist.*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992) (No. 90-918). The Supreme Court granted certiorari to consider "whether the im-

The terms of Title IX gave educational institutions notice that they must prevent their employees from themselves engaging in intentional gender discrimination. See *Franklin*, 503 U.S. at 75, 112 S. Ct. at 1037. Thus, school administrators cannot deny admission to female applicants because of their gender. See *Cannon*, 441 U.S. at 709, 99 S. Ct. at 1964. School administrators cannot discriminate against teachers on account of sex. See *North Haven Bd. of Educ.*, 456 U.S. at 530, 102 S. Ct. at 1922-23. Teachers cannot sexually harass their students. See *Franklin*, 503 U.S. at 74-75, 112 S. Ct. at 1037.

The present complaint, however, does not allege that a school employee discriminated against LaShonda in any of the foregoing ways. The complaint does not allege, for example, that Fort, Maples, Pippin, or Querry sexually harassed LaShonda. Rather, the complaint alleges that

plied right of action under Title IX . . . supports a claim for monetary damages." *Franklin*, 503 U.S. at 62-63, 112 S. Ct. at 1031. The Court emphasized that "the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place." *Id.* at 65-66, 112 S. Ct. at 1032. In fact, the *Franklin* Court rejected the arguments of the United States as *amicus curiae* precisely because those arguments concerned the existence *vel non* of a cause of action for teacher-student sexual harassment, a question which the Court considered "irrelevant." *Id.* at 69, 112 S. Ct. at 1034.

The *Franklin* Court discussed the notice element of the Spending Clause solely to counter the school board's argument that "the normal presumption in favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress' Spending Clause power." *Id.* at 74, 112 S. Ct. at 1037. Viewed in this light, the Supreme Court's suggestion that teacher-student sexual harassment gives rise to a cause of action under Title IX was arguably dicta. We assume that *Franklin* created a cause of action for teacher-student sexual harassment under Title IX, but we are wary of extending this assumed holding to student-student sexual harassment. In any event, the Court's discussion of this issue does not foreclose our own consideration of whether appellant has stated a claim under Title IX.



these individuals failed to take measures sufficient to prevent a *non-employee* from discriminating against LaShonda. We do not think that the Board was on notice when it accepted federal funding that it could be held liable in this situation.

### B.

First, as we have noted, nothing in the language or history of Title IX suggests that Title IX imposes liability for student-student sexual harassment.<sup>15</sup> Second, the imposition of this form of liability would so materially affect schools' decisions whether to accept Title IX funding that it would require an express, unequivocal disclosure by Congress.<sup>16</sup> Adopting appellant's theory of liability, however, could give rise to a form of "whipsaw" liability, under which public schools would face lawsuits from both the alleged harasser and the alleged victim of the harassment. Moreover, reasonable public school officials could perceive the likely number of such suits to be large. Because our endorsement of appellant's theory of liability

<sup>15</sup> The dissent devotes a great deal of attention to whether Congress intended that Title IX create a cause of action for student-student sexual harassment. *See Post*, at \*1-\*7. We seriously doubt whether Congress considered this problem at all when it enacted Title IX, but, in any case, the dissent's heavy reliance on its conclusory analysis of the language and history of Title IX is largely irrelevant. The question is not whether Congress intended to create a cause of action under Title IX for student-student sexual harassment but, rather, whether Congress gave school boards notice of this form of liability. In the absence of any supporting legislative history, statutory construction of ambiguous language cannot support a finding of notice as required by the Spending Clause.

<sup>16</sup> Private schools that receive federal funding would also be subject to suit under appellant's theory of Title IX liability. Private school teachers and administrators, however, would not ordinarily be subject to suit under § 1983, as would their public school counterparts, because they would not ordinarily be acting under color of state law. *See* § 1983; *see generally supra*, n.2. Accordingly, we discuss individual liability only with respect to public school employees.

would alter materially the terms of the contract between Congress and recipients of federal funding, appellant fails to state a claim upon which relief can be granted.

The essence of appellant's complaint is this: once a public school student complains to her teacher that a classmate has sexually harassed her, the teacher and the school board become subject to the threat of liability in money damages under federal law if they can prevent the classmate from harassing again and fail to do so. *See, e.g., Bosley*, 904 F. Supp. at 1023 ("Once a school district becomes aware of sexual harassment, it must promptly take remedial action which is reasonably calculated to *end the harassment.*") (emphasis added). In practical terms, this means that school officials would have to isolate an alleged harasser from other students through a suspension or expulsion.

The complaint devotes little attention to what measures the Board could have taken to avoid liability. The complaint admits that Querry and Fort tried to stop G.F.'s harassment by threatening him and by separating him from LaShonda within Fort's classroom. Appellant clearly does not believe that these measures sufficed. As evidence of "deliberative indifference," the complaint also alleges that the Board failed to create a school sexual harassment policy. It seems unlikely, however, that the mere existence of such a policy would foreclose liability under appellant's theory of the case.

Apparently, the appropriateness of the Board's remedial measures depends on whether the harassment actually ends. The complaint suggests that G.F. should have been "suspended, kept away from LaShonda, or disciplined in [some] way" after Lashonda complained. The Department of Justice argues broadly that a school board must take "effective action" in response to an allegation of harassment. We take these arguments to mean the same thing: a school board must immediately isolate an alleged

harasser from other students to avoid the threat of a lawsuit under Title IX.

Physical separation of the alleged harasser from other students is the only way school boards can ensure that they cannot be held liable for future acts of harassment. If a school official simply tells the alleged harasser, "Don't do it again," and the harasser does it again, then the board becomes susceptible to the argument that it had the power to end the harassment, but failed to do so out of "deliberate indifference." If the official merely transfers the alleged harasser to another classroom, the board faces the threat of suit for any acts of harassment committed by him in the new classroom—after all, the school had notice of his dangerous propensities and did not do all it could to prevent him from harassing his new classmates. Segregating the sexes into two separate programs within the same school would violate the spirit, if not the letter, of Title IX. Therefore, in practical terms, to avoid the threat of Title IX liability under appellant's theory of the case, a school must immediately suspend or expel a student accused of sexual harassment.<sup>17</sup>

Appellant's standard of liability therefore creates for school boards and school officials a Hobson's choice: On the one hand, if a student complains to a school official about sexual harassment, the official must suspend or expel the alleged harasser or the board will face potential liability to the victim. Moreover, if a public school official with control over the harasser finds out about his misconduct and fails to isolate him, that official runs the risk of

<sup>17</sup> This is the approach, incidentally, that some school boards have already adopted. See, e.g., Tamar Lewis, *Kissing Cases Highlight Schools' Fears of Liability for Sexual Harassment*, N.Y. Times, Oct. 6, 1996, at A22, A22 ("While the recent suspensions of two little boys for kissing girls were widely seen as excessive, they highlight the confusion that is sweeping schools as educators grapple with a growing fear that they may be sued for failing to intervene when one student sexually harasses another.").

personal liability under 42 U.S.C. § 1983 for depriving the victim of her Title IX rights if the harasser engages in further abuse.<sup>18</sup> See *Nicole M.*, 1997 WL 193919, at \*13; *Oona R.-S.*, 890 F. Supp. at 1462; see also *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723-24 (6th Cir. 1996) (holding that the remedial scheme of Title IX does not preclude a section 1983 claim based on the same conduct).

On the other hand, if the public school official, presiding over a disciplinary hearing, suspends or expels the alleged harasser, the school board may face a lawsuit alleging that the official acted out of bias—out of fear of suit. The right to a public education under state law is a property interest protected by the Due Process Clause of the Fourteenth Amendment. See *Goss v. Lopez*, 419 U.S. 565, 574, 95 S. Ct. 729, 736, 42 L. Ed. 2d 725 (1975). Accordingly, students facing a deprivation of this right must be afforded due process.<sup>19</sup> *Id.* at 579, 95 S. Ct. at 738. A fair hearing in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S.

<sup>18</sup> If we were to rule in favor of appellant, Fort, Maples, Pippin, Querry, and Dumas would arguably be entitled to qualified immunity against § 1983 liability for their actions in this case. See *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1995). Ruling in favor of appellant, however, would deprive future, similarly situated defendants of qualified immunity, because it would clearly establish a statutory right of which a reasonable school employee would know.

<sup>19</sup> If Georgia provided a procedure for challenging the impartiality of the school's decisionmaker, the alleged harasser would have received all the process to which he was entitled, and he would have no claim under the Due Process Clause. See *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc). Absent such a procedure, he could bring suit in federal court under § 1983, alleging that the state failed to accord him the process he was due. Whether the alleged harasser repairs to state court or to federal court, however, the disruptive effect on school officials, teachers, and students would be the same.



133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955). The decisionmaker who presides over the hearing must be impartial.<sup>20</sup> See *Withrow v. Larkin*, 421 U.S. 35, 46,

<sup>20</sup> In his separate opinion, JUDGE CARNES insists that the requirements of the procedural component of the Due Process clause are met when a school disciplinarian affords a student faced with suspension an "informal" opportunity to explain his side of the story. See *Post*, at \*1-\*2. JUDGE CARNES' reasoning is correct, as far as it goes, but he focuses on one narrow subset of cases—"any suspension of up to ten days." *Post* at \*1.

In *Goss*, the Supreme Court held that, "[a]t the very minimum, . . . students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing." *Id.* at 579, 95 S. Ct. at 738. The kind of notice and the formality of the hearing will depend, of course, on the nature and severity of the deprivation the student faces: for example, "due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581, 95 S. Ct. at 740 (emphasis added); see also, e.g., *Board of Curators v. Horowitz*, 435 U.S. 78, 86, 98 S. Ct. 948, 953, 55 L. Ed. 2d 124 (1978) (noting that a college student's dismissal for academic reasons necessitates fewer procedural protections than a dismissal for disciplinary reasons).

At the end of its opinion in *Goss*, however, the Supreme Court stated, "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than rudimentary procedures will be required." *Id.* at 584, 95 S. Ct. at 741. The Supreme Court left open the possibility that a more formal notice and hearing would be required for disciplinary actions more serious than ten-day suspensions, and so shall we.

Furthermore, regardless of the nature of the notice and the quality of the hearing, an individual faced with the deprivation of a property interest is entitled to an impartial decisionmaker—a requirement JUDGE CARNES seems to discount. See, e.g., *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987) ("An impartial decision-maker is an essential guarantee of due process."). JUDGE CARNES admits, for example, that a public school principal would be impermissibly biased, for purposes of the Due Process Clause,

95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975); *McKinney v. Pate*, 20 F.3d 1550, 1561 (11th Cir. 1994) (en banc).

As we explain above, appellant's theory of the case could impose personal liability on any public school official who learns of an allegation of harassment and fails to exercise his authority to prevent a recurrence of the harassment. Were we to adopt appellant's theory of the case, therefore, public school officials would have a financial incentive to punish alleged student harassers. A financial incentive may render a decisionmaker impermissibly biased.<sup>21</sup> See *Gibson v. Berryhill*, 411 U.S. 564,

if the principal "took a bribe from [a] complaining student's parents in return for suspending or expelling [an] alleged wrongdoer." *Post*, at \*2. JUDGE CARNES, however, refuses to accept that a principal would be just as impermissibly biased if the principal were forced to pay money to a complaining student for not suspending or expelling an alleged wrongdoer. We fail to grasp the distinction.

<sup>21</sup> On page \*4 of his separate opinion, JUDGE CARNES leads us through a parade of horrors which, he imagines, we have created by suggesting that appellant's theory of the case would potentially give public school officials an impermissible financial incentive to punish alleged student harassers. The dire consequences he conjures, however, will never come to pass precisely because we are not adopting appellant's theory of Title IX liability. Only if we were to adopt her theory might public school officials face potential liability under both Title IX and the procedural component of the Due Process Clause. But we do not adopt appellant's theory of liability.

With regard to non-school settings, JUDGE CARNES overstates our opinion and then criticizes us for the breadth of our holding. He chides us for suggesting that "[a]ll federal, state, or local officials called upon to decide what to do in response to one person's complaint about another would have a financial incentive to avoid a lawsuit, which would disqualify them from making a decision." *Post*, at \*4. We suggest nothing of the kind.

Nevertheless, on the merits of his critique, we suppose that all officials in such situations could face lawsuits alleging impermissible bias—if none of those officials had any form of immunity from suit,

579, 93 S. Ct. 1689, 1698, 36 L. Ed. 2d 488 (1973). Therefore, the disciplinary measures required to avoid liability under Title IX could subject the school board to the threat of suit by the disciplined harasser.<sup>22</sup>

which, of course, they *do* have. Stated differently, public decision-makers have immunity from suit to protect them from the sort of bias which might otherwise give rise to violations of the Due Process Clause. Judges, for example, have absolute immunity from suit because "the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435, 113 S. Ct. 2167, 2171, 124 L. Ed. 2d 391 (1993). Similar concerns motivate qualified immunity. See generally *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 2736, 73 L. Ed. 2d 396 (1982) (reasoning that, without qualified immunity, "there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 2d 1363 (1950)) (alterations in original)). In fact, as we discuss *supra*, note 18, the individual defendants in this case would likely be entitled to qualified immunity.

In sum, we create no new procedural due process rights, as JUDGE CARNES asserts. Our opinion does not even suggest that we would *have to* create such rights if we were to uphold appellant's theory of Title IX liability. Rather, our opinion states that this form of liability is a *logical extension* of appellant's theory of the case, and Congress gave no notice to public school boards that they would be potentially undertaking this form of liability when they accepted federal funding under Title IX.

<sup>22</sup> All of the foregoing assumes, of course, that the allegations of harassment are true. While we hesitate to assume that any allegations of student-student sexual harassment are false, we do not doubt that school students will be tempted into mischief by the prospect of swift punishment against any classmate whom they accuse of sexual harassment.

Moreover, public school officials would find such false accusations difficult to combat. Under Title VII standards of liability, which the appellant, the United States, and the dissent seem anxious to adopt, an employer may be sued for retaliating against an employee who complains about sexual harassment. See generally 42 U.S.C. § 2000e-3(a) (1994) ("It shall be an unlawful employment practice

In addition to the threat of this whipsaw liability, schools would face the virtual certainty of extensive litigation costs. These costs would include not only lawyers fees, but also the burdens associated with the disruption of the educational process. The litigation we describe would inevitably involve teachers, students, and administrators in time-consuming discovery and trial preparation. Schools could reasonably expect to receive from Congress explicit notice of these consequences. They did not.<sup>23</sup>

for an employer . . . to discriminate against any individual . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Thus, under the logical implications of appellants theory of Title IX liability, a school board could face a lawsuit from the complaining student if it disciplines her for bringing a vexatious complaint against a classmate. As discussed in the text, the threat of lawsuits under § 1983 against the public school officials themselves would soon follow.

<sup>23</sup> Appellant and the Department of Justice draw our attention to the regulatory activities of the Office of Civil Rights of the United States Department of Justice ("OCR"). The OCR issued interim guidelines concerning schoolhouse sexual harassment on August 16, 1996. See Sexual Harassment Guidance: Peer Sexual Harassment, 61 Fed. Reg. 42,728 (1996). These guidelines issued after the alleged harassment of LaShonda. Moreover, at the time of the alleged harassment, the code of federal regulations did not discuss student-student sexual harassment. See 34 C.F.R. § 106.31 (1992). Therefore, OCR's regulations did not put the Board on official notice of its potential liability for G.F.'s harassment of LaShonda.

Nevertheless, appellant and the Department of Justice urge that we defer to the OCR's current interpretation of Title IX for purposes of this case. The OCR issued final policy guidance on student sexual harassment on March 13, 1997. See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (1997). In this publication, the OCR constructs a labyrinth of factors and caveats which simply reinforces our conclusion that the Board was not on notice that it could be held liable in the present situation.

According to the March 13 guidance, schools are liable for failing to eliminate



School boards could reasonably believe that this form of whipsaw liability would arise in a substantial number of cases. According to a 1993 survey of American public

sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) . . . by another student . . . that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.

*Id.* at 12,038.

Because the meaning of this language may not be obvious to school officials, the March 13 guidance lists several factors which should be taken into account when a student is sent to the office for sexually harassing another student. Among other factors and sub-factors, the school official should consider the "welcomeness" of the conduct, the age of the harasser, the age of the victim, the relationship between the parties, the degree to which the conduct was sexual in nature, the duration of the conduct, the frequency of the conduct involved, the degree to which the conduct affected the victim's education, the pervasiveness of the conduct at the school, the location of the incident, the occurrence of any similar incidents at the school, the occurrence of any incidents of gender-based but non-sexual harassment, the size of the school, and the number of individuals involved in the incident.

The school official should keep in mind that "in some circumstances, nonsexual conduct may take on sexual connotations and may rise to the level of sexual harassment." *Id.* at 12,039. He should also remember that "a hostile environment may exist even if there is no tangible injury to the student," and even if the complaining student was not the target of the harassment. *Id.* at 12,041. In addition, the official must recall that a single act of student-student harassment can create a hostile environment. *See id.* Finally, the school official must keep in mind that, if he does not kick the alleged harasser out of school, and the harasser misbehaves again, the official could be personally liable if a jury concludes, after the fact, that he could have done more to prevent the harasser from harming his classmates.

The foregoing analysis assumes, of course, that the school official actually knew of the complaint against the harasser and summoned him to the front office. According to the OCR, however, the official may be liable even if he did not know about the harassment: the official may cause the school to violate Title IX if he

school students, 65% of students in grades eight to eleven were victims of student-student sexual harassment. *See American Ass'n of Univ. Women Educ. Found., Hostile Hallways: The AAUW Survey on Sexual Harassment in American Schools 11 (1993) [hereinafter AAUW Survey]*. Extrapolating from Department of Education statistics, roughly 7,784,000 public school students in grades eight through eleven would consider themselves to be victims of student-student sexual harassment.<sup>24</sup> Furthermore, 59% of students (including 52% of female students) in grades eight to eleven responded that they had sexually harassed other students. *See AAUW Survey, supra*, at 11-12. Thus, if this survey is accurate, around 7,177,000 public school students in grades eight to eleven, male and female, would admit to sexually harassing other students.

We do not adopt these statistics as our definitive guide to the extent of sexual harassment in America's public schools. We draw attention to these figures only to illustrate what school boards would have to consider in deciding whether to accept federal funding under Title IX. The AAUW Survey could suggest to reasonable public school officials that a substantial number of lawsuits will be brought under appellant's theory of Title IX liability.

failed to exercise "due care" in discovering the misconduct. *See id.* at 12,042. The foregoing does not address the lawsuit that the harasser's parents will file when the school official summarily suspends him. According to appellant and the Department of Justice, the Board received clear notice of this form of liability when it accepted federal funding under Title IX. We think not.

<sup>24</sup> To calculate the number of purported student victims of harassment in the nation, we multiplied the percentage of victims provided by the AAUW Survey by the total number of students enrolled in public schools in grades eight to eleven during the 1992-1993 school year. We obtained the enrollment statistics from the world-wide-web home page of the Department of Education. *See, e.g., U.S. Dep't of Educ., Enrollment in Public Elementary and Secondary Schools by Grade: Fall 1980 to Fall 1994 (last modified Mar. 1996) <http://nces01.ed.gov/nces/pubs/D96/D96T042.html> [hereinafter U.S. Education]*. We used the same process to calculate the total number of professed student harassers in the nation.

Therefore, imposition of this form of liability would materially affect their decision whether to accept federal educational funding.<sup>25</sup>

An enactment under the Spending Clause must read like a prospectus. Just as a prospectus must unambiguously disclose all material facts to a would-be purchaser, an enactment under the Spending Clause must unambiguously disclose to would-be recipients all facts material to their decision to accept Title IX funding. The threat of whipsaw liability in a substantial number of cases would materially affect a Title IX recipient's decision to accept federal funding, yet Congress did not provide unambiguous notice of this type of liability in the language or history of that statute. We will not alter retrospectively, the terms of the agreement between Congress and recipients of Title IX funding.<sup>26</sup>

<sup>25</sup> In JUDGE CARNES' separate opinion, he characterizes our use of statistics as an attempt "to establish that student-student sexual harassment is such a widespread and extensive problem that a different holding of this case would impose massive liability upon school officials and boards." *Post*, at \*8. As we indicate in the text, this is not our objective at all. We cite these statistics because school boards may consider them to be a valid indicator of the amount of litigation that they will face. If a lawyer for the Monroe County School Board were trying to advise the Board about the potential costs and benefits of accepting federal funding, would it not matter to that lawyer whether accepting federal funds would give rise to a few lawsuits or thousands of lawsuits?

JUDGE CARNES suggests that the AAUW Survey overstates the actual number of lawsuits that could be brought under appellant's theory of Title IX liability. We agree that the survey did not use the same definition of student-student sexual harassment as our case law dictates, but statistical purity would arguably require a jury verdict agreeing with the allegations of each student who claimed to have been harassed. In any event, there are plenty of reasons for public school officials to overlook the statistical flaws in the AAUW Survey when it is their own pocketbooks—not those of federal judges—that are at stake.

<sup>26</sup> As noted above, the purpose of enactments under the Spending Clause is "to further [Congress's] broad policy objectives by conditioning receipt of federal moneys upon compliance by the

## IV.

We condemn the harm that has befallen LaShonda, a harm for which Georgia tort law may indeed provide redress. Appellant's present complaint, however, fails to state a claim under Title IX because Congress gave no clear notice to schools and teachers that they, rather than society as a whole, would accept responsibility for remedying student-student sexual harassment when they chose to accept federal financial assistance under Title IX. Accordingly, the judgment of the district court is **AFFIRMED**.

Circuit Judges EDMONDSON, COX, BIRCH, DUBINA, BLACK and CARNES concur in the court's opinion with the exception of Parts III.B and III.C.

recipient with federal statutory and administrative directives." *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 2772, 65 L. Ed. 2d 902 (1980) (opinion of Burger, C.J.). Congress uses the spending power "to induce governments and private parties to cooperate voluntarily with federal policy." *Id.* If no one chooses to receive federal funds under a proposed legislative program, Congress's intent would be frustrated and its policy objectives would remain unfulfilled. *See Rowinsky*, 80 F.3d at 1013.

Prospective recipients will decline federal funding and current recipients will withdraw from federal programs if the cost of legislative conditions exceeds the amount of the disbursement. Federal funding represents only 7% of all revenues for public elementary and secondary schools in the United States. During the 1992-1993 school year, for example, American schools received \$17,261,252,000 from the federal government out of a total budget of \$247,626,168,000. *See U.S. Education*, *supra*, at <D96T157.html>.

School authorities must weigh the benefit of this relatively small amount of funding against not only the threat of substantial institutional and individual liability—as suggested by the AAUW Survey—but also the opportunity costs of devoting to litigation hours that might otherwise be spent running their schools. Because harassment of the sort experienced by LaShonda is rarely observed directly by school officials, Title IX claims of the sort envisioned by appellant would require the time-consuming testimony of numerous student witnesses. Imposing the liability of the sort envisioned by appellant could induce school boards to simply reject federal funding—in contravention of the will of Congress. *See Rowinsky*, 80 F.3d at 1013.



BLACK, Circuit Judge, concurring:

I concur in the Court's judgment and, with the exception of Parts IIIB and IIIC, join in its opinion. I write separately only to respond to the dissent's contention that the Court's disposition contravenes the "plain meaning" of Title IX. It is axiomatic that the statutory language is the starting point for interpreting the meaning of a statute. *Ardestani v. INS*, 502 U.S. 129, 135, 112 S. Ct. 515, 519 (1991); *United States v. McLemore*, 28 F.3d 1160, 1162 (11th Cir. 1994). If the statutory language is unambiguous, the courts must enforce the statute as written absent a clearly-expressed legislative intent to the contrary. *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527 (1981); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980); *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1460 (11th Cir. 1992). On the other hand, where the statutory language is ambiguous, then a court may look to legislative history in an effort to discern the intent of Congress. See *Royal Caribbean Cruises, Ltd. v. United States*, 108 F.3d 290, 293 (11th Cir. 1997); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1498 (11th Cir. 1991).

The present case requires us to decide whether Title IX prescribes liability for the failure of a school board to prevent a student from discriminating against a classmate on the basis of sex. The text of Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (1994). As the dissent recognizes, "[t]he absolute prohibition contained in the text is framed solely in terms of who is protected." The statute simply does not specify what relationship, if any, the perpetrator of an underlying act of sexual harassment must have to the federally-funded educational institution to trigger Title IX liability.

The dissent nevertheless divines from congressional silence an unambiguous endorsement of the proposition that "[t]he identity of the perpetrator is simply irrelevant." Under this conception of Title IX, liability presumably would attach anytime the school board failed to prevent anyone—student, teacher, parent, neighborhood resident—from discriminating on the basis of sex to the extent that such action inhibited a student from realizing the full benefits of federally-funded education. In my view, the text of Title IX permits at least equally plausible constructions that would circumscribe liability more narrowly. Specifically, the text of Title IX may be interpreted to impose liability only when the school board or one of its agents bears direct responsibility for discriminating on the basis of sex, as would be the case had any of Lashonda Davis' teachers participated in the sexual harassment she was forced to endure. The absence of any reliable textual indication regarding which of these constructions Congress envisioned invites consideration of legislative history and the congressional power from which the statute emanates in an effort to discover congressional intent. The Court's approach thus represents an entirely appropriate effort to effectuate congressional will in the absence of unambiguous textual guidance, not, as the dissent appears to suggest, strident judicial refusal to enforce clearly expressed legislative intent.

CARNES, Circuit Judge, concurring specially:

I concur in the holding that Title IX does not create a cause of action against public school boards or officials for failure to prevent or remedy student-student sexual harassment. In my view, that holding is correct for essentially those reasons stated in Parts I, II, III A, and IV of Judge Tjoflat's opinion, and I join those parts of it, which constitute the opinion of the Court. However, for the reasons explained below, I do not join Parts III B and C of Judge Tjoflat's opinion, which express only his own views.<sup>1</sup>

### I.

The "Hobson's choice" or "whipsaw liability" discussion in Part III B of the opinion is based upon a fundamentally erroneous premise. If school officials could be sued for failing to prevent or remedy student-student sexual harassment, that part of the opinion says, the potential liability would amount to a financial incentive to punish the accused harassers, which would or could render school officials impermissibly biased and require recusal. Of course, a student does have a property interest in a public education which is protected by the Due Process Clause of the Fourteenth Amendment.<sup>2</sup> And, due process does

<sup>1</sup> Parts I, II, III A, and IV of Judge Tjoflat's opinion constitute the opinion of the Court, because those parts are joined by six of the ten judges participating in this decision. By contrast, none of the other nine judges participating in this decision have joined Parts III B and C of that opinion.

<sup>2</sup> The nature and extent of the protection afforded the property interest in a public education, the due process requirements attendant to its loss, depends upon the severity of the loss. In *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975), the Supreme Court held that, with any suspension of up to ten days, all the Due Process Clause requires is for the student to "be given oral or written notice of the charges against him and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 419 U.S. at 581, 95 S. Ct. at 740; accord

require that a decision depriving the student of that property interest be made by someone who does not have a pecuniary interest in having the student suspended or expelled. To take an extreme example, regardless of any other process afforded, due process would be violated if a principal took a bribe from the complaining student's parents in return for suspending or expelling the alleged wrongdoer. But it is an entirely different matter to suggest, as Part III B of the opinion does, that a school official's *potential* liability to the complaining student if that official fails to take legally *required* action amounts to a "financial incentive" which renders that official "impermissibly biased" and requires recusal from deciding what action, if any, is required in the circumstances. As authority for that novel proposition, the opinion cites only *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S. Ct. 1689, 1698 (1973). The *Gibson* decision provides no support for the proposition, because it does not hold, or even imply, that an official's potential liability for failing to properly exercise decisionmaking authority constitutes

*Arnold v. Board of Educ.*, 880 F.2d 305, 318 (11th Cir. 1989). The Supreme Court said in *Goss* that "[i]n the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred," and "[w]e hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is." 419 U.S. at 582, 95 S. Ct. at 740. The Court has since explained that all *Goss* requires before a suspension is an "informal give and take" in order to provide the student "the opportunity to characterize his conduct and put it in what he deems the proper context." *Board of Curators v. Horowitz*, 435 U.S. 78, 86, 98 S. Ct. 948, 953 (1978) (quoting *Goss*, 419 U.S. at 584, 95 S. Ct. at 741); accord, e.g., *C.B. v. Driscoll*, 82 F.3d 383, 386 (11th Cir. 1996) ("The dictates of *Goss* are clear and extremely limited."). These "rudimentary precautions," to use the description from *Goss* itself, 419 U.S. at 581, 95 S. Ct. at 740, are a far cry from a due process tribunal hearing attendant to some property interest deprivations.



a "financial incentive" which renders the official "impermissibly biased."

*Gibson* involved a state optometry board composed exclusively of private practitioners who were in competition with corporate employee optometrists. Those board members had a substantial pecuniary interest in excluding from the market corporate employee optometrists, who accounted for nearly half of all the practicing optometrists in the state. The Supreme Court affirmed the district court's holding that the private practitioner's pecuniary interest in eliminating competition disqualified them from deciding whether the practice of optometry by corporate employees as such constituted unprofessional conduct justifying license revocation. See 411 U.S. at 578-79, 93 S. Ct. at 1698. That holding does not support the proposition that any time an official can be sued for failing to respond properly to a complaint that official is disqualified from making a decision about how to respond to the complaint.

If that suggested proposition were the law of this circuit—and thankfully it is not—no school official could ever discipline a student for any alleged misconduct as a result of another student's complaint without violating the due process rights of the disciplined student. The reason such an imposition of discipline would violate due process is that such an official would always have a financial incentive, under that view, to believe the complaint in order to avoid a lawsuit filed by the complaint. The ramifications of such a rule would extend to discipline for any type of misconduct, because there is no principled basis on which a distinction can be drawn between discipline following a complaint about sexual harassment and that following a complaint about any other type of misconduct.

Nor is there any principled basis by which such an automatic disqualification rule could be confined to school settings. It would also apply outside the Title IX context; for example, in jail and prison settings. If one prisoner

complains to a jailer or warden about what some other prisoner has done to him, under Judge Tjoflat's view that official will have a financial interest in avoiding a lawsuit from the complaining prisoner (alleging deliberate indifference), and such an interest disqualifies the official from making any disciplinary decision about the complaint. So, not only would the disqualification rule be automatic, it also would be universal. No one would be able to decide any disciplinary matters in schools, in prisons, or in any other setting within the purview of the Due Process Clause. All federal, state, or local officials called upon to decide what to do in response to one person's complaint about another would have a financial incentive to avoid a lawsuit, which would disqualify them from making a decision. That cannot be the law, and it is not the law.

Judge Tjoflat's response to having these flaws in his reasoning pointed out is contained in footnote 21 of his opinion, which will reward close scrutiny. First, that footnote assures us that we should not worry about the far-reaching ramifications of the suggestion that potential liability equals disqualifying bias, because this Court is holding that school officials have no liability under Title IX for student-student sexual harassment. Apparently forgotten is the assurance, in Part IV of the opinion, that "Georgia tort law may indeed provide redress" for the very same conduct. If a school official's potential liability for not acting properly is a disqualifying financial interest, it matters not whether that potential liability is posed by Title IX or by state tort law. The opinion does not, and logically cannot, suggest otherwise. Instead, it adopts a head-in-the-sand approach which ignores everything but Title IX, as though that were the only potential source of liability for school officials who are called upon to decide what to do about student-student sexual harassment complaints.

With its head comfortably in the sand, the opinion also ignores entirely the obvious implications of its propo-

sition for student-student disputes involving allegations of misbehavior other than sexual harassment. Part of the quotidian business of teachers and principals is resolving disputes in which one student alleges another has threatened, hit, stolen from, or otherwise mistreated him or her. Some of those disputes pose potential liability for the teacher or principal who fails to act. For example, a school official who fails to take appropriate action to protect a student from a threatened thrashing at the hands of another student may have to answer in a state court tort action. Under the reasoning contained in Part III B of the opinion, that potential liability would prevent any school official from deciding what to do about such a complaint, because that official's potential liability to the complaining student would amount to a disqualifying financial bias. A careful reading of the opinion reveals that it fails to explain why that result would not necessarily follow from its suggested reasoning.

As to settings outside the school context, footnote 21 of the opinion offers two responses to this criticism. First, it simply denies—"We suggest nothing of the kind"—that its proposition about potential liability equaling disqualifying bias would have any application outside the schoolhouse. That *ipse dixit* assertion has as little reasoning behind it as the proposition itself. The opinion fails to offer any reason why the automatic bias theory it suggests would not apply in non-school contexts, because there is no reason. The right to an unbiased decision maker is a rudiment of due process, which is as applicable outside schools as within them.

Apparently realizing that the *ipse dixit* approach will not shield the naked illogic of its position from view, the opinion attempts to camouflage the problem with talk of immunity. "Don't worry," we are told, officials in non-school settings have "immunity from suit" which removes any potential liability for failing to decide for the complaining party, and any financial incentive to favor that

party disappears along with the potential liability. The thinnest stripe of the attempted camouflage is the opinion's reference to judicial immunity. We are not talking about judges. We are talking about the myriad of federal, state, and local non-judicial officials who are regularly called upon to decide what to do in response to one person's complaint about another. Jailers, wardens, and other corrections officials are but a few examples. These people are not judges. They do not enjoy judicial immunity.

Even so, the opinion says, there is qualified immunity. There are three problems with the assertion that the availability of qualified immunity distinguishes non-school officials from school officials by removing any threat of lawsuit by a complaining party dissatisfied with an official's resolution of a complaint outside the school setting. First, qualified immunity is not absolute. Second, qualified immunity does not shield officials from liability grounded on state law. Third, and most obviously, the doctrine of qualified immunity is the same for school officials as for non-school officials. If that doctrine shields non-school officials from threat of lawsuit sufficiently to remove any disqualifying financial incentive to decide for a complainant, it does exactly the same for school officials. Thus, with its talk of qualified immunity, Part III B of the opinion has succeeded in reaching around and biting itself in the back. If what the plurality opinion says about the due process implications of qualified immunity is true, then the opinion has disproven the very proposition it is seeking to defend.

## II.

Part III C of Judge Tjoflat's opinion attempts to establish that student-student sexual harassment is such a widespread and extensive problem that a different holding in this case would impose massive liability upon school officials and boards. In its words, agreeing with appellant's theory of liability would give rise to "thousands of lawsuits." Tjoflat Opinion at n.25. The factual premise of



that reasoning is based entirely upon one survey report. See American Ass'n of Univ. Women Educ. Found., *Hostile Hallways: The AAUW Survey on Sexual Harassment in American Schools* (1993) (hereinafter "*AAUW Survey Report*").

The *AAUW Survey Report* was not the subject of an evidentiary hearing in the district court, nor has it been examined in a hearing in any other court insofar as we know. Neither party to this appeal even mentioned the survey in the briefs; it was discussed only in one amicus brief. In general, we should be reluctant to incorporate into our reasoning the results of a survey that has not been examined critically or tested in a trial or evidentiary hearing, the time-honored and proven methods our system of justice uses to determine material facts.

Beyond the general problems with using surveys in judicial decision making, there are specific reasons why employment of this particular survey for the purpose Judge Tjoflat uses it in Part III C of his opinion is ill-advised. That purpose, of course, is to show student-student sexual harassment is so rampant that if a cause of action existed for it the resulting flood of litigation would inundate our public school systems, or at least school officials would have a basis for fearing that result—the basis being the survey.

The first reason we ought to be especially cautious about such a use of this particular survey is that its purported findings are, in the words of the sponsors of the survey: "startling," and for some "the results will be surprising and shocking." *Id.* at 2. The reason for such descriptions is that it is difficult to believe that 65 percent of all eighth through eleventh grade students have been sexually harassed by other students, and that half of all female and male students in those grades are self-professed sexual harassers. We ought to be reluctant to accept as fact, or assume that school officials would accept as fact, such "surprising and shocking" statistics based upon a

single survey of only a tiny fraction of one percent of the total number of students in four grades.

Even a cursory look at the survey report gives more reason to be dubious about the opinion's use of the report. The survey asked students how often "[d]uring your whole school life" has anyone "when you did not want them to" done any of the following things, and it then provided a list of behavior the survey defined as sexual harassment. See *id.* at 5. Some behavior on that list clearly constitutes sexually harassing behavior of the most serious type. But included in the list is other behavior that is less serious and far less likely to lead to complaints and litigation, which is what Judge Tjoflat uses the survey to predict (or posits that school boards will use it to predict). For example, included in the survey's definitional list of sexual harassment was any instance in which another student: "Made sexual comments, jokes, gestures, or looks;" or "[s]pread sexual rumors about you;" or "[s]aid you were gay or lesbian." *Id.* at 5. Remember that a single unwelcome instance of such activity, during the student's entire school life, renders that student a victim of sexual harassment for purposes of the survey.

A student who has ever been looked at by another student in an unwelcome way perceived to be sexual is defined by the survey to be a sexual harassment victim. Any student ever called gay or lesbian is also a sexual harassment victim in the survey's view. Any time unwelcome rumors are spread about a student having any type of sexual activity (presumably including kissing) with another student, those students are sexual harassment victims as the survey defines it. To take one final example of how the total incidence of "sexual harassment" reported overstates legally actionable incidents of sexual harassment, consider that the survey definition includes incidents in which someone "[f]lashed or 'mooned' you." *Id.* At 5. Suppose that a student at a school function (which the survey defines to include school sporting events and field

trips) "moons" all the students in attendance, or all those from a rival school. A single episode of that misbehavior—which is not nice and certainly should not occur, but has been known to happen—could make sexual harassment victims, as the survey defines the term, out of scores or even hundreds of students. Yet, such an incident is extremely unlikely to result in litigation against the school.

It is also worthy of note that the survey asked students whether the behavior it defined as sexual harassment had happened to them "[d]uring your whole school life." *Id.* at 5. Therefore, the 65 percent figure reflects those who have experienced that behavior at any time during any school year of their life. It does not purport to be annual data.

Finally, Part III C of the opinion fails to point out that the survey also asked the students if any of them who had been sexually harassed, as that term was defined in the survey, had told a teacher about the experience. Only 7 percent of the sixty-five percent had. *See AAUW Survey Report* at 14. Whatever the reasons for not reporting such behavior to a teacher, the failure to do so in all but the rarest instances has obvious implications for the existence of causes of action against schools or the likelihood of actual litigation.

The opinion attempts to deflect criticism about misuse of the survey by suggesting that while the opinion's author does not necessarily think that the survey is a valid indicator of how much student-student sexual harassment occurs, school boards might think that the survey is and reject federal funding as a result of it. With all due respect, there is no reason to believe that school boards would be less likely than federal judges to see the flaws in such an interpretation of the survey. School boards know more about what is going on in their schools than we do, and they can be expected to critically examine any survey before using it as a basis for turning down federal funding for their schools. Rather than hiding behind

speculation about how school board officials might interpret the survey, the opinion ought to face up to the flaws in its suggested use of the survey.

Upon its release, the sponsors of the survey stated that they were "confident that the results of this survey will become a focal point on the agendas of policy makers, educators, and others concerned with the education of America's children." *Id.* at 21. Their confidence about how the survey would be used might be undermined by Part III C of Judge Tjoflat's opinion. More importantly, we are not policymakers. We do not have agendas. We ought to leave this survey to those who do.

### III.

The parts of Judge Tjoflat's opinion that neither I nor any other member of the Court except its author joins, Parts III B and C, are not necessary to the opinion's essential reasoning or to the holding of this case. Neither the language of Title IX nor its legislative history indicates that Congress intended to saddle school boards and officials with liability for student-student sexual harassment, and school boards had no notice that such liability would result from accepting Title IX funds. For those reasons, I do join the holding of the Court and Parts I, II, III A, and IV of Judge Tjoflat's opinion.



BARCKETT, Circuit Judge, dissenting, in which HATCHETT, Chief Judge, KRAVITCH and HENDERSON, Senior Circuit Judges, join.

In this case it is alleged that a fifth-grade student, Lashonda Davis, was sexually harassed for over six months at school by another student, culminating in a sexual battery for which her harasser pled guilty in state court. It is also alleged that school officials were completely aware of the escalating gravity of the situation and took no meaningful action to deter it. The majority holds that no matter how egregious—or even criminal—the harassing discriminatory conduct may be, and no matter how cognizant of it supervisors may become—a teacher could observe it directly and regularly—there would be no obligation to take any action to prevent it under the very law which was passed to eliminate sexual discrimination in our public schools. To reach this conclusion the majority ignores the plain meaning of Title IX as well as its spirit and purpose. I suggest that under appropriate statutory analysis as well as Supreme Court precedent, Davis has stated a cause of action.

The first principle in statutory analysis requires that a statute be accorded the plain meaning of its text. It is well established that “[c]ourts must assume that Congress intended the ordinary meaning of the words it used, and absent a clearly expressed legislative intent to the contrary, that language is generally dispositive.” *Gonzalez v. McNary*, 980 F.2d 1418, 1420 (11th Cir. 1993) (internal citation omitted). The Supreme Court has emphasized that “only the most extraordinary showing of contrary intentions from [legislative history] would justify a limitation on the ‘plain meaning’ of the statutory language.” *Garcia v. United States*, 469 U.S. 70, 75 (1984). The text of Title IX provides in pertinent part:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under

any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681(a). There is no ambiguity in this language. It is undisputed that the Monroe County School System is a recipient of federal financial assistance. It is also well established that hostile environment sexual harassment is a form of intentional discrimination which exposes one sex to disadvantageous terms or conditions to which members of the other sex are not exposed. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); see also *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) (hostile environment for student created by teacher is a form of discrimination cognizable under Title IX). The absolute prohibition contained in the text is framed solely in terms of who is protected. The identity of the perpetrator is simply irrelevant under the language: “No person . . . shall . . . be excluded from participation . . . , be denied the benefits of, or be subjected to discrimination . . . .” Thus, under the statute’s plain language, liability hinges upon whether the grant recipient maintained an educational environment that excluded any person from participating, denied them benefits, or subjected them to discrimination.

Should one need to interpret the statute, it must initially be noted that Title IX was designed to protect individuals from sex discrimination by denying federal financial aid to those educational institutions that bear responsibility for sexually discriminatory practices. *Cannon v. University of Chicago*, 441 U.S. 677, 704 & n.36 (1979) (citing 117 Cong. Rec. 39252 (1971)). “It is a strong and comprehensive measure which . . . is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . . .” *Id.* at 704 n.36 (quoting Sen. Birch Bayh, 118 Cong. Rec. 5806-07 (1972)). Thus, in interpreting Title IX, “[t]here is no doubt that if we are to give [it] the scope that its origins dictate, we must accord it a sweep as broad as its lan-

guage." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (internal quotation marks omitted).

Moreover, the Office of Civil Rights of the Department of Education, the federal agency responsible for enforcement of Title IX, interprets the statutory language to impose liability on school officials for permitting an educational environment of severe, persistent, or pervasive peer sexual harassment when they know or should know about it, and fail to take immediate and appropriate corrective action to remedy it. See *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties*, 62 Fed. Reg. 12,034, at 12,039-41 (1997). The OCR's final policy guidance explains that:

a school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. . . . Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its *own* discrimination in failing to remedy it once the school has notice.

*Id.* at 12,039-40 (emphasis added).<sup>1</sup>

<sup>1</sup> It is worth noting that the OCR's interpretation of Title IX as holding schools liable for permitting peer sexual harassment is consistent with its interpretation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964), as holding schools liable for allowing peer racial harassment. This is significant because the Supreme Court has noted that "Title IX was patterned after Title VI." *Cannon*, 441 U.S. at 694. As the majority points out, the language of the two statutes is virtually identical, and the Supreme Court has held that they should be interpreted in the same way. See Majority Op. at 21-22 (citing *Cannon*, 441 U.S. at 696). The OCR issued An Investigative Guidance on Racial Incidents and Harassment Against Students at Educational Institutions in 1994 providing, "[T]he existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by

Notwithstanding the administrative interpretation of the statute, as well as its plain meaning, the majority concludes that Congress did not intend to create a cause of action under Title IX for student-on-student sexual harassment based largely on an analysis of legislative history. The majority emphasizes that "throughout this long legislative history, the drafters of Title IX never discussed student-student sexual harassment . . . ." See Majority Op. at 18. Assuming this to be true, the mere fact that student-on-student sexual harassment may not have been specifically

a recipient also constitutes different treatment on the basis of race in violation of Title VI." See 59 Fed. Reg. 11,448, at 11,448 (1994). Furthermore, the OCR has stated that the obligation of school districts with notice to remedy racially hostile environments applies "regardless of the identity of the person(s) committing the harassment—a teacher, student, the grounds crew, a cafeteria worker, neighborhood teenagers, a visiting baseball team, a guest speaker, parents or others." *Id.* at 11,450. As explained by the OCR:

Under this analysis, an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under Title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment.

*Id.* at 11,449.

Additionally, it is interesting to note that shortly after the enactment of Title VI, the former Fifth Circuit recognized that school officials must take steps within their power to prevent racial harassment among students. In *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir. 1967) (en banc), which is binding precedent in this circuit, see *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the court of appeals entered a model desegregation decree which complied with "the letter and spirit of the Civil Rights Act of 1964", *Jefferson County*, 380 F.2d at 390. The decree provided in relevant part:

Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior.

*Id.* at 392.



mentioned in the Congressional debates does not mean that it was not encompassed within Congress's broad intent of preventing students from being "subjected to discrimination" in federally funded educational programs. The majority suggests that it is clear that Congress was not concerned with student-on-student sexual harassment because the legislative history focused primarily on the issues of discrimination in "admission[s]," "available services or studies," and "employment within an institution," none of which were pertinent to the claim raised in this case. See Majority Op. at 13-14, 17. However, under this narrow view, even the cause of action under Title IX for teacher-on-student sexual harassment recognized by the Supreme Court in *Franklin*, 503 U.S. at 60, would not be supported by the majority's view of legislative history. In *Franklin* the Court considered a high-school student's Title IX suit alleging that a teacher had sexually harassed and assaulted her and that school officials, who had knowledge of the misconduct, had failed to intervene. *Id.* at 63-64. Surely the majority would not suggest that the cause of action that the Supreme Court recognized in *Franklin* does not exist simply because it was not specifically mentioned in the legislative history. Moreover, the majority's interpretation of the statute based on legislative history would suggest that by using the unqualified words "discrimination under any education program" Congress only intended to cover the narrow areas of admissions, services, and employment. This contravenes both common sense and the plain meaning of the words of the statute.

Furthermore, the majority contends that Title IX may not be construed as authorizing a cause of action for a school board's failure to remedy student-on-student sexual harassment because such an interpretation would conflict with the notice of liability requirement of the Spending Clause, which is the constitutional provision under which Title IX was ostensibly enacted.<sup>2</sup> See Majority Op. at 22,

<sup>2</sup> In *Franklin*, the Supreme Court assumed, without deciding, that Title IX was enacted pursuant to the Spending Clause. *Franklin*,

25-26 (citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). However, it is clear that the school board would have sufficient notice of liability based on the plain meaning of the statute, which unequivocally imposes liability on grant recipients for maintaining an educational environment in which students are subjected to discrimination. Further, sufficient notice was provided to satisfy the Spending Clause prerequisite for a damages action under Title IX as set forth in *Franklin*, 503 U.S. at 74-75. In *Franklin* the Court explained that the notice requirement for damages actions under the Spending Clause in Title IX cases is satisfied where the alleged violation was intentional. *Id.* The Court found that since sexual harassment constitutes intentional discrimination in violation of Title IX, the Spending Clause does not prohibit a cause of action for teacher-on-student sexual harassment under Title IX. *Id.* Similarly, in this case the alleged violation of Title IX was intentional because the school board knowingly permitted a student to be subjected to a hostile environment of sexual harassment. See, e.g., *Doe v. Petaluma City Sch. Dist.*, 949 F.Supp. 1415, 1422, 1427 (N.D.Cal. 1996) (holding that hostile environment sexual harassment constitutes "intentional discrimination," and that school are liable under Title IX when they know or should know about student-on-student sexual harassment and fail to take prompt remedial action); *Bruneau v. South Kortright Central Sch. Dist.*, 935 F.Supp. 162, 172 (N.D.N.Y. 1996) (recognizing that a school's failure to take corrective action in response to hostile environment created by peers despite actual notice of harassment subjects it to liability for intentional discrimination, and therefore to damages under Title IX), *Burrow v. Postville Community Sch. Dist.*, 929 F.Supp. 1193, 1205 (N.D. Iowa

503 U.S. at 75 & n.8. It is also arguable that the provision was enacted pursuant to § 5 of the Fourteenth Amendment. For purposes of this discussion, I will assume, like the majority, that the authorizing provision was the Spending Clause.

1996) (holding that intentional discrimination may be inferred from "the totality of relevant evidence, including evidence of the school's failure to prevent or stop the sexual harassment despite actual knowledge of the sexually harassing behavior of students over whom the school exercised some degree of control"); *Oona R.-S. v. Santa Rosa City Schs.*, 890 F.Supp. 1452, 1464, 1469 (N.D. Cal. 1995) (explaining that discriminatory intent can be found in "the toleration of harassing behavior of male students, or the failure to take adequate steps to deter or punish peer harassment"); see also *Canutillo Independent School Dist. v. Leija*, 101 F.3d 393, 406 (5th Cir. 1996), *cert. denied*, 1991 WL 195227 (1997) (noting that "when the Supreme Court referred to 'intentional discrimination' in *Franklin*, it was referring to any form of discrimination other than disparate impact discrimination.").

Finding that Title IX authorizes a cause of action for student-on-student sexual harassment, we should then follow the lead of other courts, including the Supreme Court, in turning to Title VII principles to delineate the scope of the school board's duty and identify the elements of a cause of action under Title IX. In relevant part, Title VII requires an employer to take steps to assure that the working environment of its employees is free from sexual harassment<sup>3</sup> that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Meritor*, 477 U.S. at 67 (internal quotation marks and brackets omitted).

<sup>3</sup> Sexual harassment involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. 29 C.F.R. § 1604.11(a) (1991). Such harassment constitutes actionable sex discrimination in the workplace either as "quid pro quo" sexual harassment, which conditions employment benefits upon sexual favors, or as "hostile environment" sexual harassment, which creates an intimidating, hostile or offensive working environment that unreasonably interferes with an individual's work performance. See *Meritor*, 477 U.S. at 62, 65.

It is appropriate to turn to Title VII because the Supreme Court has explicitly relied on Title VII principles in explaining that sexual harassment constitutes intentional "discrimination" under Title IX:

Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.

*Franklin*, 503 U.S. at 74-75. Significantly, the Court relied on *Meritor*, a Title VII case, to resolve the issue.

A well established line of cases preceded the Supreme Court's decision to use Title VII principles in resolving a Title IX case. Prior to *Franklin*, courts had held that such principles are applicable in Title IX suits brought by employees of educational institutions. See, e.g., *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988) (Title IX's legislative history "strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII."); see also *Preston v. Commonwealth of Virginia ex rel. New River Community College*, 31 F.3d 203, 207 (4th Cir. 1994); *Mabry v. State Bd. of Comm. Coll. & Occup. Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987), *cert. denied*, 484 U.S. 849 (1987). Courts had also relied on Title VII when evaluating Title IX sexual harassment claims by students. See, e.g., *Moire v. Temple Univ. Sch. of Medicine*, 613 F. Supp. 1360, 1366 & n.2 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986) (hostile environment sexual harassment); *Alexander v. Yale Univ.*, 459 F. Supp. 1, 4 (D. Conn. 1977), *aff'd*,



631 F.2d 18 (2d Cir. 1980) (*quid pro quo* sexual harassment).

Since the Supreme Court's *Franklin* case, at least two circuit courts have found that Title VII standards are applicable to students' Title IX sexual harassment claims. See *Seamons v. Snow*, 84 F.3d 1226, 1232-33 & n.7 (10th Cir. 1996) (holding that although Title IX does protect against hostile environment sexual harassment in schools, plaintiff failed to state a valid claim because he did not allege that the harassment in question was based on sex); *Murray v. New York University College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995) ("The [*Franklin*] Court's citation of *Meritor* . . . , a Title VII case, in support of *Franklin*'s central holding indicates that, in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII."); cf. *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1994) (holding that although an analogy to Title VII might be available in future cases, the court need not reach the issue because defendant school counselor was entitled to qualified immunity against a claim that he failed to respond to known sexual harassment of the plaintiff by other students). But cf. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996), cert. denied, 117 S.Ct. 165 (1996) (holding that student-on-student sexual harassment cannot be the basis for a cause of action under Title IX unless the plaintiff demonstrates that the school responded to sexual harassment claims differently based on sex.).

Additionally, virtually every district court to address the issue has held that Title IX, by analogy to Title VII, imposes liability on schools for failure to remedy severe and pervasive student-on-student sexual harassment. See, e.g., *Bruneau*, 935 F.Supp. at 172 ("When an employer fails to act to remedy a hostile environment created by

co-workers the employer discriminates against an individual in violation of Title VII. Similarly, [this] Court finds that in the Title IX context, when an educational institution fails to take steps to remedy peer-on-peer sexual harassment, it should be held liable to the harassed student for that discriminatory conduct."); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F.Supp. 1006, 1021 (W.D. Mo. 1995) ("Following the [*Franklin*] Court's logic, the same rule as when an employer is held liable for a sexually hostile work environment under Title VII must apply when a school district has knowledge of a sexually hostile school environment and takes no action."); see also *Nicole M. v. Martinez Unified School Dist.*, No. C-93-4531 MHP, 1997 WL 193919, at \*8 (N.D. Cal. Apr. 15, 1997); *Collier v. William Penn Sch. Dist.*, 956 F.Supp. 1209, 1213-14 (E.D. Pa. 1997); *Franks v. Kentucky School for the Deaf*, 956 F.Supp. 741, 746 (E.D. Ky. 1996); *Petaluma*, 949 F.Supp. at 1427; *Wright v. Mason City Community Sch. Dist.*, 940 F.Supp. 1412, 1419-20 (N.D. Iowa 1996); *Burrow*, 929 F.Supp. at 1205; *Oona R.-S.*, 890 F.Supp. at 1467-69 & n.13; *Patricia H. v. Berkely Unified Sch. Dist.*, 830 F.Supp. 1288, 1293 (N.D. Cal. 1993). But see *Garza v. Galena Park Indep. Sch. Dist.*, 914 F.Supp. 1437, 1438 (S.D. Tex. 1994).<sup>4</sup> Thus, the applicable case law firmly supports applying Title VII principles to delineate the scope of a school board's liability under Title IX for failure to remedy student-on-student sexual harassment.

Notwithstanding this abundant support for applying Title VII principles, the majority contends that Title VII principles may not be applied in this case because "the exposition of liability under Title VII depends upon agency principles." See Majority Op. at 25 n.14. The

<sup>4</sup> The majority emphasizes that only district courts have held that a cause of action exists for student-on-student sexual harassment under Title IX. However, the number of district courts that have so held provides strong support for the theory advanced by appellants in this case.

majority asserts that "[a]gency principles are useless in discussing liability for student-student harassment under Title IX, because students are not agents of the school board."<sup>5</sup> *Id.* This argument overlooks the Supreme Court's caveat in *Meritor* that "common law principles [of agency] may not be transferable in *all* their particulars to Title VII." *Meritor*, 477 U.S. at 72 (emphasis added).<sup>6</sup> Under *Meritor*'s flexible approach, courts have held that an employer may be held liable under Title VII for failing to take action to remedy a hostile environment created by non-employees, who are certainly not agents of the employer. See, e.g., *Powell v. Las Vegas Hilton Corp.*,

<sup>5</sup> The majority also argues that Title VII case law is inapplicable to Title IX because Title IX, unlike Title VII, was enacted under the Spending Clause. However, the Supreme Court has relied on Title VII in analyzing claims under Title VI, which also was enacted under the spending power. In *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983), for example, the Court found that Title VI's prohibition of discrimination was "subject to the construction given the antidiscrimination proscription of Title VII in *Griggs v. Duke Power Co.* . . ." *Guardians*, 463 U.S. at 592. The Court also adopted Title VII's "business necessity" defense to analyze disparate impact claims in a Title VI case involving student placement. See *Board of Educ. v. Harris*, 444 U.S. 130, 151 (1979). Likewise, this court has utilized Title VII to analyze a disparate impact claim under Title VI, stating that "[t]he elements of a disparate impact claim may be gleaned by reference to cases decided under Title VII." *Georgia State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985). Thus, the fact that Title VII is not a Spending Clause statute has not been a bar to importing its standards into Title VI, which formed the template for Title IX, and therefore should not be a bar to importing its standards into Title IX.

<sup>6</sup> As Judge Tjoflat has explained, "Title VII, as interpreted in *Meritor*, requires employers to take steps to ensure that sexual harassment does not permeate the workplace. To the extent that the application of common law agency principles frustrates Title VII's goal of eliminating such harassment—by effectively relieving the employer of the responsibility of pursuing that goal—those principles must yield." *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1544, 1546 n.2 (11th Cir. 1997) (Tjoflat, J., concurring in part, dissenting in part).

841 F.Supp. 1024, 1028 (D. Nev. 1992) (denying motion to dismiss blackjack dealer's claim that her employer violated Title VII by failing to protect her from sexual harassment by gamblers at her table, because "an employer could be liable for the sexual harassment of employees by non-employees, including its customers"); *Magnuson v. Peak Technical Services, Inc.*, 808 F.Supp. 500, 512-13 (E.D. Va. 1992) (holding that employers of alleged victim can be held liable for failing to take corrective action to remedy hostile environment created by non-employee); see also *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) ("The environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers to the workplace.") (emphasis added) (internal citations omitted).<sup>7</sup> The employers were held liable in these cases by virtue of their own failure to comply with the duty of eliminating discrimination under Title VII—not under any theory of vicarious liability for the acts of a third party.

Application of Title VII principles also recognizes that a student should have the same protection in school that an employee has in the workplace.<sup>8</sup> See *Franklin*, 503

<sup>7</sup> Moreover, guidelines promulgated under Title VII recognize that an employer may be held liable for failing to take corrective action to remedy a hostile environment created by a third party. See 29 C.F.R. § 1604.11(e) ("An employer may also be responsible for the acts of nonemployees in the workplace . . . , where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.").

<sup>8</sup> Indeed, where there are distinctions between the school environment and the workplace, they "serve only to emphasize the need for zealous protection against sex discrimination in the schools." *Patricia H.*, 830 F. Supp. at 1292-93. The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the work-



U.S. at 74-75. Just as a working woman should not be required to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," *Meritor*, 477 U.S. at 67 (internal citation omitted), a female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education. In the employment context, women historically have not had the power to simply walk away from an environment that is made to be demeaning, embarrassing, and humiliating for them because of their gender. Similarly, it is virtually impossible for female students to leave their assigned schools to escape an environment where they are harassed and intimidated on the basis of their gender. Just as in the employment setting where employees are dependent on their employers to ensure workplace equality, so too students are dependent on teachers and school officials to control the educational environment. Additionally, sexual harassment—regardless of its source—subordinates girls in the classroom just as much as in the workforce. Although a hostile environment can be created by someone who supervises or otherwise has power over the victim, a hostile environment can also be created by co-workers or fellow students who have no direct power relationship whatsoever with the victim.<sup>9</sup> And like Title VII, Title IX was enacted to

place, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, "[a] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program." *Id.* at 1293 (citation omitted).

<sup>9</sup> Numerous circuit courts, including this one, have held that an employer's failure to take prompt remedial action after notice of severe and pervasive sexual harassment by a co-worker is actionable. See, e.g., *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982); see also *DeAngelis v. El Paso Municipal Police Officers*

remedy that discrimination and ensure sexual equality in public education.

Having determined that Title VII principles should guide our analysis of the scope of the school board's liability under Title IX, I conclude that Davis's allegations sufficiently plead a cause of action. The elements a plaintiff must prove to succeed in this type of sexual harassment case are: (1) that she is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) that some basis for institutional liability has been established. See *Meritor*, 477 U.S. at 66-73; see also *Harris v. Forklift Sys. Inc.*, 114 S.Ct. 367, 370-71 (1993); *Lipsett*, 864 F.2d at 898-902; *Henson*, 682 F.2d at 903-05.

Assumed as true, the facts alleged in the complaint, together with all reasonable inferences therefrom, satisfy these elements. There is no question that the allegations satisfy the first three requirements. First, as a female, LaShonda is a member of a protected group. Second, she was subject to unwelcome sexual harassment in the form of "verbal and physical conduct of a sexual nature." 29 C.F.R. § 1604.11(a). Third, the harassment LaShonda faced clearly was on the basis of her sex.

As to the fourth requirement, I recognize that a hostile environment in an educational setting is not created by simple childish behavior or by an offensive utterance,

*Assoc.*, 51 F.3d 591, 593 (5th Cir. 1995); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994); *Carr v. Allison Gas Turbine Div. Gen. Motors Corp.*, 32 F.3d 1007, 1009 (7th Cir. 1994); *Karibian v. Columbia University*, 14 F.3d 773, 779 (2d Cir.), cert. denied, 114 S.Ct. 2693 (1994); *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 182 (6th Cir.), cert. denied, 113 S.Ct. 831 (1992); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1345-46 (10th Cir. 1990); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1015-16 (8th Cir. 1988).

comment, or vulgarity. Rather, Title IX is violated "[w]hen the [educational environment] is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's [environment] and create an abusive environment.'" *Harris*, 114 S. Ct. at 370 (quoting *Meritor*, 477 U.S. at 65, 67) (internal citations omitted). In determining whether a plaintiff has established that an environment is hostile or abusive, a court must be particularly concerned with (1) the frequency of the abusive conduct; (2) the conduct's severity; (3) whether it is physically threatening or humiliating rather than merely offensive; and (4) whether it unreasonably interferes with the plaintiff's performance. *Harris* at 371. The Court has explained that these factors must be viewed both objectively and subjectively. If the conduct is not so severe or pervasive that a reasonable person would find it hostile or abusive, it is beyond Title IX's purview. Similarly, if the plaintiff does not subjectively perceive the environment to be abusive, then the conduct has not actually altered the conditions of her learning environment, and there is no Title IX violation. *Id.* at 370.

In this case, the five months of alleged harassment was sufficiently severe and pervasive to have altered the conditions of LaShonda's learning environment from both an objective and a subjective standpoint: (1) G.F. engaged in abusive conduct toward LaShonda on at least eight occasions; (2) the conduct was sufficiently severe to result in criminal charges against G.F. to which he pled guilty in state court; (3) the conduct, such as the groping and requests for sex, was physically threatening and humiliating rather than merely offensive; and (4) the conduct unreasonably interfered with LaShonda's academic performance, resulting in the substantial deterioration of her grades and emotional health. The facts alleged go far beyond simple horseplay, childish vulgarities, or adolescent flirting.

Finally, I believe that the fifth and final element—whether any basis for the Board's liability has been shown, has likewise been sufficiently alleged. Under Title VII, an employer may be held liable for a hostile environment of sexual harassment created by a co-worker if "the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Faragher*, 111 F.3d at 1538; *Henson*, 682 F.2d at 905; see also *Meritor*, 477 U.S. at 72-73. By analogy, in this instance the school board may be held liable if it knew or should have known of the harassment and failed to take timely remedial action. In Title VII cases, an employee can demonstrate that the employer knew of the harassment "by showing that she complained to higher management of the harassment or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Henson*, 682 F.2d at 905. (citation omitted). In this case, Davis has alleged that she told the principal—a higher level manager—of the harassment on several occasions. She also alleged that at least three separate teachers, in addition to the principal, had actual and repetitive knowledge from LaShonda, her mother and other students. Finally, Davis alleged that despite this knowledge, the school officials failed to take prompt remedial action to end the harassment.<sup>10</sup> These allegations regarding institutional liability, as well as the other allegations, are sufficient to establish a prima facie claim under Title IX for sexual discrimination due to the Board's failure to take action to remedy a sexually hostile environment.

For all the foregoing reasons, I would reverse the district court's dismissal of Davis's Title IX claim against the Board.

<sup>10</sup> The complaint also alleged that during the time of the harassment, the Board had no policy prohibiting the sexual harassment of students in its schools, and had not provided any policies or training to its employees on how to respond to student-on-student sexual harassment.



## APPENDIX B

UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT

No. 94-9121

AURELIA DAVIS,  
a/n/f of Lashonda D.,  
*Plaintiff-Appellant,*  
v.

MONROE COUNTY BOARD OF EDUCATION,  
CHARLES DUMAS and BILL QUERRY,  
*Defendants-Appellees.*

Appeal from the United States District Court  
for the Middle District of Georgia

Feb. 14, 1996

Before BIRCH and BARKETT, Circuit Judges, and  
HENDERSON, Senior Circuit Judge.

BARKETT, Circuit Judge:

Aurelia Davis, as mother and next friend of LaShonda D., appeals the district court's order dismissing her claims under Title IX and § 1983 against the Monroe County Board of Education ("Board"), Board Superintendent Charles Dumas and elementary school Principal Bill Querry (collectively "defendants"). Davis' complaint for injunctive relief and compensatory damages alleged that

LaShonda was sexually harassed on a continuous basis by a male, fifth-grade classmate, that defendants knew of the harassment yet failed to take any meaningful action to stop it and protect her, and that LaShonda suffered harm as a result of their failure to act. The defendants' failure to act, Davis asserted, discriminated against LaShonda and denied her the benefits of a public education in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (1988). Davis also claimed that defendants' omissions violated LaShonda's liberty interests to be free from sexual harassment and from intrusions on her personal security in violation of her substantive due process rights under the United States Constitution.

The district court dismissed the Title IX claim against the Board, concluding that

[t]he sexually harassing behavior of a fellow fifth grader is not part of a school program or activity. Plaintiff does not allege that the Board or an employee of the Board had any role in the harassment. Thus, any harm to LaShonda was not proximately caused by a federally-funded educational provider.

Aurelia D. v. Monroe County Bd. of Educ., 862 F.Supp. 363, 367 (M.D.Ga.1994). The court also dismissed the § 1983 due process claims against the Board and the individual defendants.

On appeal, Davis argues that the court erred by dismissing her Title IX claim against the Board<sup>1</sup> and by dismissing her § 1983 due process claims against all defendants. She also contends that she made an equal protection claim on which the district court failed to rule. Because we find them without merit, we reject Davis' arguments regarding the due process and equal protection

<sup>1</sup> Davis does not appeal the district court's dismissal of the Title IX claims against the individual defendants.

claims without further discussion. See 11th Cir. Rule 36-1. For the reasons that follow, however, we conclude that Davis' allegations that the Board knowingly permitted a hostile environment created by another student's sexual harassment of LaShonda state a valid Title IX claim against the Board and accordingly we reverse the dismissal of her complaint as to that claim.

### I. BACKGROUND

Davis' factual allegations, presumed as true in our review of a motion to dismiss, *Duke v. Cleveland*, 5 F.3d 1399, 1402 (11th Cir.1993), can be summarized as follows. Over the six-month period between December 1992 and May 1993, "G.F.," a fellow fifth-grader at a Monroe County elementary school, sexually harassed and/or abused LaShonda by attempting to fondle her, fondling her, and directing offensive language toward her. In December, for instance, G.F. attempted to touch LaShonda's breasts and vaginal area, telling her, "I want to get in bed with you," and "I want to feel your boobs." Two similar incidents occurred in January 1993. In February, G.F. placed a doorstop in his pants and behaved in a sexually suggestive manner towards LaShonda. Other incidents occurred later in February and in March. In April, G.F. rubbed against LaShonda in the hallway in a sexually suggestive manner. G.F.'s actions increased in severity until he finally was charged with and pled guilty to sexual battery in May 1993.

LaShonda reported G.F. to her teachers and her mother after each of the incidents and, after all but one of the incidents, Davis called the teacher and/or the principal to see what could be done to protect her daughter. The requests for protection went unfulfilled. Following one incident, for example, LaShonda and other girls whom G.F. had sexually harassed asked their teacher for permission to report G.F.'s harassment to the principal. The

teacher denied the request, telling the girls, "[i]f he [the principal] wants you, he'll call you." After LaShonda told her mother of another incident of harassment, adding that she "didn't know how much longer she could keep him off her," Davis spoke with Principal Querry and asked what action would be taken to protect LaShonda. Querry responded, "I guess I'll have to threaten him [G.F.] a little bit harder," and he later asked LaShonda "why she was the only one complaining." LaShonda and Davis also asked that LaShonda, who had an assigned seat next to G.F., be allowed to move to a different seat. Even this request was refused and she was not allowed to move her seat away from G.F. until after she had complained for over three months. School officials never removed or disciplined G.F. in any manner for his sexual harassment of LaShonda.

Finally, the complaint alleged that G.F.'s uncurbed and unrestrained conduct severely curtailed LaShonda's ability to benefit from her elementary school education, lessening her capacity to concentrate on her schoolwork and causing her grades, previously all As and Bs, to suffer. The harassment also had a debilitating effect on her mental and emotional well-being, causing her to write a suicide note in April 1993.

### II. STANDARD OF REVIEW

Reviewing the claim *de novo*, we will uphold the dismissal only if it appears beyond a doubt that the allegations in the complaint do not constitute a claim upon which relief may be granted. *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1484 (11th Cir.1994). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Taylor v. Ledbetter* 818 F.2d 791, 794 n. 4 (11th Cir. 1987) (en banc), cert. denied, 489 U.S. 1065, 109 S.Ct. 1337, 103 L.Ed.2d 208 (1989) (quotation omitted).



### III. DISCUSSION

Title IX provides in pertinent part as follows:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681(a) (1988). It is undisputed that the Monroe County School System is a recipient of federal financial assistance. Accordingly, the issue before us is whether the Board's alleged failure to take action to stop G.F.'s sexual harassment of LaShonda "excluded [her] from participation in, . . . denied [her] the benefits of, or . . . subjected [her] to discrimination under" the Monroe County educational system on the basis of her sex.

Davis argues that the Board's failure to stop the sexual harassment discriminated against LaShonda and denied her the benefits of her education on the basis of sex. In support of this argument, Davis urges us to apply sexual harassment principles from the more extensive caselaw of Title VII, which prohibits sex discrimination in the workplace.<sup>2</sup> In relevant part, Title VII requires an employer to take steps to assure that the working environment of its employees is free from sexual harassment<sup>3</sup>

<sup>2</sup> Title VII makes it unlawful "for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a) (1) (1988).

<sup>3</sup> Sexual harassment involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. 29 C.F.R. § 1604.11(a) (1991). Such harassment constitutes actionable sex discrimination in the workplace either as "quid pro quo" sexual harassment, which conditions employment benefits upon sexual favors, or as "hostile environment" sexual harassment, which creates an intimidating, hostile or offensive working environment that unreasonably interferes with an individual's work performance. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 62, 65, 106 S.Ct. 2399, 2403, 2404, 91 L.Ed.2d 49 (1986).

that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986) (quotation omitted). The Board contends, however, that Title VII principles are not applicable to Title IX cases such as the present one.

Enacted in 1972, Title IX was designed to protect individuals from sex discrimination by denying federal financial aid to those educational institutions that bear responsibility for sexually discriminatory practices. *Cannon v. University of Chicago*, 441 U.S. 677, 704 & n. 36, 99 S.Ct. 1946, 1961 & n. 36, 60 L.Ed.2d 560 (1979) (citing 117 Cong.Rec. 39252 (1971)). "It is a strong and comprehensive measure which . . . is needed if we are to provide women with solid legal protection as they seek education and training for later careers. . . ." *Id.* at 704 n. 36, 99 S.Ct. at 1961 n. 36 (quoting Sen. Birch Bayh, 118 Cong.Rec. 5806-07 (1972)). To accomplish this goal, employees and students of federally funded educational institutions who are discriminated against on the basis of sex have a private right of action under Title IX for injunctive relief and compensatory damages. *Id.* at 717, 99 S.Ct. at 1968; *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75-76, 112 S.Ct. 1028, 1037-38, 117 L.Ed.2d 208 (1992). Moreover, in interpreting Title IX, "[t]here is no doubt that if we are to give [it] the scope that its origins dictate, we must accord it a sweep as broad as its language." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521, 102 S.Ct. 1912, 1918, 72 L.Ed.2d 299 (1982) (quotation omitted).

Although the Supreme Court recognized a private right of action under Title IX in 1979, see *Cannon*, 441 U.S. at 717, 99 S.Ct. at 1968, until recently the denial of financial aid to the institution was the only remedy to a Title IX plaintiff. Accordingly, early lawsuits brought under

Title IX primarily challenged discriminatory practices in athletic programs and admissions policies. See, e.g., *id.* at 680, 99 S.Ct. at 1949. In 1992, however, the Supreme Court unanimously allowed monetary damages to private plaintiffs for intentional violations of Title IX, see *Franklin*, 503 U.S. at 76, 112 S.Ct. at 1038, increasing the number of Title IX suits brought by employees and students alleging that their educational institutions subjected them to sexual discrimination.

In receiving sexual discrimination claims by teachers and other employees of educational institutions under Title IX, courts have regularly applied Title VII principles. In *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir.1988), for example, the plaintiff was a female medical student in the residency program and also was an employee of the University. *Id.* at 886. She alleged that University hospital supervisory personnel had subjected her to an atmosphere of sexual harassment at the hospital. *Id.* at 886-92. In determining that Title VII sexual harassment principles applied to this "mixed employment-training" context, the Second Circuit relied on Title IX's legislative history, "which strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII." *Id.* at 897; see also *Preston v. Commonwealth of Virginia ex rel. New River Community College*, 31 F.3d 203, 207 (4th Cir.1994); *Mabry v. State Bd. of Community Colleges*, 813 F.2d 311, 316 n. 6 (10th Cir.1987).

Courts also have relied upon Title VII when evaluating Title IX sexual harassment claims by students. In determining that Title IX prohibits a teacher's quid pro quo sexual harassment of a student, for example, one court observed that

[it is] perfectly reasonable to maintain that academic achievement conditioned upon submission to sexual demands constitutes sex discrimination in education,

just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment

.....

*Alexander v. Yale Univ.*, 459 F.Supp. 1, 4 (D.Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir.1980). Similarly, in recognizing that Title IX prohibits the existence of a hostile environment due to a teacher's sexual harassment of a student, another court observed that "[t]hough the sexual harassment 'doctrine' has generally developed in the context of Title VII, these [Title VII] guidelines seem equally applicable to Title IX." *Moire v. Temple Univ. Sch. of Medicine*, 613 F.Supp. 1360, 1366 n. 2 (E.D.Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir.1986).

Nonetheless, in *Franklin v. Gwinnett County Public Schools*, 911 F.2d 617 (11th Cir.1990), *rev'd*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), this court declined to apply a Title VII analysis to the question of whether compensatory damages were available in a suit brought by a student under Title IX. *Id.* at 622. On appeal, however, the Supreme Court reversed, and relied upon Title VII principles and authority in holding that Title IX authorizes an award of compensatory damages. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74-75, 112 S.Ct. 1028, 1037, 117 L.Ed.2d 208 (1992). *Franklin* involved a high-school student's allegations that a teacher had sexually harassed and assaulted her and that school officials, who had actual knowledge of the misconduct, had failed to intervene. *Id.* at 63-64, 112 S.Ct. at 1031. In rejecting the argument that the specific language of Title IX did not give educational institutions sufficient notice of their liability for damages for such discrimination, the Supreme Court stated:

Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's



sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 [106 S.Ct. 2399, 2404, 91 L.Ed.2d 49] (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe. *Franklin*, 503 U.S. at 75, 112 S.Ct. at 1037. Importantly, the Court relied on Title VII principles and cited *Meritor*, a Title VII case, to resolve the issue.

Subsequently, several courts have understood *Franklin* to authorize the application of the Title VII standards to a student's Title IX sexual harassment claim against her school. In *Murray v. New York University College of Dentistry*, 57 F.3d 243 (2d Cir.1995), the Second Circuit looked to Title VII in addressing a student's Title IX claim that she was subjected to a sexually hostile educational environment created by a patient at the dental school. *Id.* at 248. The district court had dismissed the complaint after determining that the facts alleged were insufficient to show that the college knew that plaintiff was subjected to a hostile environment created by the patient's persistent sexual advances. *Id.* at 247-48. In considering the appropriate standard for determining whether the college had notice of the hostile environment, the Second Circuit observed: "[t]he [*Franklin*] Court's citation of *Meritor* . . . , a Title VII case, in support of *Franklin*'s central holding indicates that, in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII." *Murray*, 57 F.3d at 249. Upon application of Title VII standards, the Second Circuit determined that the facts alleged were insufficient to show that the college had notice of the hostile environment. *Id.* at 249-51.

Similarly, the District Court for the Northern District of California relied on *Franklin* in determining that a

student may state a Title IX claim for hostile environment sexual harassment where the harassment is initiated by fellow students. In *Doe v. Petaluma School District*, 830 F.Supp. 1560 (N.D.Cal.1993), the plaintiff alleged that she was harassed when she was a seventh- and eighth-grade student in the defendant school district. The harassment allegedly began early in plaintiff's seventh-grade year, when two male students approached her and said "I hear you have a hot dog in your pants." *Id.* at 1564. Over the next year and a half, other students regularly made similarly offensive remarks to plaintiff and spread sexual rumors and innuendoes about her. During this period, plaintiff and her parents spoke with her school counselor on numerous occasions and asked him to stop the harassment. The counselor told them he would take care of everything, but he initially did nothing more than warn some of the offenders, stating that "boys will be boys." *Id.* at 1564-65. After the harassment and complaints had continued for more than a year, the counselor suspended two of the students. *Id.* at 1565. By that time, however, going to school had become emotionally difficult for plaintiff, and she ultimately transferred to a private school at her parents' expense in order to avoid the harassment. *Id.* at 1565-66.

Plaintiff filed suit under Title IX against the school district and several school officials for their failure to take action to stop the sexual harassment inflicted upon her by her classmates. *Id.* at 1563. Denying defendants' motion to dismiss for failure to state a claim, the court held that Title IX proscribes the same type of hostile environment sexual harassment prohibited by Title VII. *Id.* at 1571-75. In addition to relying on *Franklin* and Title IX's legislative history, the court looked to findings of the Department of Education's Office of Civil Rights ("OCR"). *Petaluma*, 830 F.Supp. at 1572 (citing *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F.Supp. 1288 (N.D.Cal. 1993)). These findings demonstrated an OCR belief that "an educational institution's failure to take appropriate

response to student-to-student sexual harassment of which it knew or had reason to know is a violation of Title IX." *Id.* at 1573 (citations omitted). The court concluded that to deny recovery to a sexually harassed student under the hostile environment theory "would violate the Supreme Court's command to give Title IX a sweep as broad as its language." *Id.* at 1575.

We likewise find it appropriate to apply Title VII principles to the question before us. As discussed in the foregoing cases, such application is supported by *Franklin*, Title IX's legislative history and the Supreme Court's mandate that we read Title IX broadly, as well as by findings of the OCR. In particular, the OCR has found that a student is subjected to sexual harassment when "unwelcome sexual advances, requests for sexual favors, or other sex-based verbal or physical conduct . . . has the purpose or effect of unreasonably interfering with the individual's education creating an intimidating, hostile, or offensive environment." Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IV (July 24, 1992), Docket No. 09-92-6002, at 2.<sup>4</sup> The OCR also has found that "[w]hen individuals who are participating in a program or activity operated by an educational institution are subjected to sexual harassment, they are receiving treatment that is different from others." *Id.* Finally, the OCR has found that "[i]f the harassment is carried out by non-agent students, the institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment." *Id.*; see also Letter of Findings by Kenneth A.

<sup>4</sup>OCR Letters of Findings are entitled to deference "as they express the opinion of an agency charged with implementing Title IX and its regulations." *Petaluma*, 830 F.Supp. at 1573. As the Supreme Court has stated, "this Court normally accords great deference to the interpretation, particularly when it is longstanding, of the agency charged with the statute's administration." *North Haven*, 456 U.S. at 522 n. 12, 102 S.Ct. at 1918 n. 12.

Mines, Regional Civil Rights Director, Region V (April 27, 1993), Docket No. 05-92-1174, at 2-4. Thus, in informally determining that Title IX prohibits peer sexual harassment in the schools, the OCR has relied on Title VII hostile environment principles.

Application of these principles to Title IX claims by students recognizes, as the Supreme Court acknowledged in *Franklin*, that a student should have the same protection in school that an employee has in the workplace. See *Franklin*, 503 U.S. at 74-75, 112 S.Ct. at 1037. Indeed, where there are distinctions between the school environment and the workplace, they "serve only to emphasize the need for zealous protection against sex discrimination in the schools." *Patricia H.*, 830 F.Supp. at 1292-93. The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school. Finally, "[a] non-discriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program." *Id.* at 1293 (quotation omitted).

Thus, we conclude that as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising author-



ities knowingly fail to act to eliminate the harassment.<sup>5</sup> Cf. *Franklin*, 503 U.S. at 74-75, 112 S.Ct. at 1037; see *Murray*, 57 F.3d at 249; *Petaluma*, 830 F.Supp. at 1575. But see *Seamons v. Snow*, 864 F.Supp. 1111, 1118 (D. Utah 1994).

In this case, by requiring that a school employee commit the harassing action in order for Davis to state a claim, the district court failed to recognize the nature of a claim for hostile environment sexual harassment. The court dismissed the complaint because, in its view, "any harm to LaShonda was not proximately caused by a federally-funded educational provider" and neither the Board nor an employee of the Board "had any role in the harassment."<sup>1</sup> *Aurelia D.*, 862 F.Supp. at 367 (emphasis added). The court's rationale thus implicitly limited sexual harassment actions to quid pro quo harassment, which conditions benefits or maintenance of the status quo upon sexual favors. This was not Davis' claim.

<sup>5</sup> The Board argues that Title VII caselaw is inapplicable to Title IX because Title IX was enacted under the spending clause. The Supreme Court, however, has relied on Title VII in analyzing claims under Title VI, which also was enacted under the spending clause. In *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), for example, the Court found that Title VI's prohibition of discrimination was "subject to the construction given the antidiscrimination provision in Title VII in *Griggs v. Duke Power Co.* [401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)] . . . ." *Guardians*, 463 U.S. at 592, 103 S.Ct. at 3227. The Court also adopted Title VII's "business necessity" defense to analyze disparate impact claims in a Title VI case involving student placement. See *Board of Educ. v. Harris*, 444 U.S. 130, 151, 100 S.Ct. 363, 375, 621 L.Ed.2d 275 (1979). Likewise, we have utilized Title VII to analyze a disparate impact claim under Title VI, stating that "[t]he elements of a disparate impact claim may be gleaned by reference to cases decided under Title VII." *Georgia State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985). Thus, the fact that Title VII is not a spending clause statute has not been a bar to importing its standards into Title VI, and therefore is no bar to importing its standards into Title IX.

The evil Davis sought to redress through her hostile environment claim was not the direct act of a school official demanding sexual favors, but rather the officials' failure to take action to stop the offensive acts of those over whom the officials exercised control. Title VII recognizes this distinction and requires employers to take steps to assure that their employees' working environment is free from sexual harassment regardless of whether that harassment is caused by the sexual demands of a supervisor or by the sexually hostile environment created by supervisors or co-workers. *Henson v. Dundee*, 682 F.2d 897, 905 (11th Cir.1982).<sup>6</sup> Under this concept, when an employer knowingly fails to take action to remedy a hostile environment caused by one co-worker's sexual harassment of another, the employer "discriminate[s] against . . . an[ ] individual" in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1).

Likewise, when an educational institution knowingly fails to take action to remedy a hostile environment caused by a student's sexual harassment of another, the harassed student has "be[en] denied the benefits of, or be[en] subjected to discrimination under" that educational program in violation of Title IX, 20 U.S.C. § 1681(a). Just as a working woman should not be required to "run

<sup>6</sup> Other circuits also recognize employer liability under Title VII based on the employer's failure to take action to remedy a hostile environment created by coworkers. See *Smith v. Bath Iron Works*, 943 F.2d 164, 165-66 (1st Cir.1991); *Karibian v. Columbia Univ.*, 14 F.3d 773, 779 (2d Cir.), cert. denied, 512 U.S. 1213, 114 S.Ct. 2693, 129 L.Ed.2d 824 (1994); *Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747, 749 (3d Cir.1990); *DeAngelis v. El Paso Municipal Police Officers Assoc.*, 51 F.3d 591, 593 (5th Cir.1995); *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 182 (6th Cir.), cert. denied, 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992); *Carr v. Allison Gas Turbine Div. Gen Motors*, 32 F.3d 1007, 1009 (7th Cir.1994); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1015-16 (8th Cir.1988); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir.1994); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1345-46 (10th Cir.1990).

a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living," Meritor, 477 U.S. at 67, 106 S.Ct. at 2405 (quotation omitted), a female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education.

Having determined that Title IX encompasses a claim for a hostile learning environment created by peer sexual harassment, we must consider the sufficiency of Davis' allegations. The elements a plaintiff must prove to succeed in this type of sexual harassment case are: (1) that she is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) that some basis for institutional liability has been established. Cf. Meritor, 477 U.S. at 66-73, 106 S.Ct. at 2405-08; see also Harris v. Forklift Sys. Inc., 510 U.S. 17, — - —, 114 S.Ct. 367, 370-71, 126 L.Ed.2d 295 (1993); Henson, 682 F.2d at 903-05.

Assumed as true, the facts alleged in the complaint, together with all reasonable inferences therefrom, satisfy these elements. There is no question that the allegations satisfy the first three requirements. First, as a female, LaShonda is a member of a protected group. Second, she was subject to unwelcome sexual harassment in the form of "verbal and physical conduct of a sexual nature." 29 C.F.R. § 1604.11(a). Third, the harassment LaShonda faced was clearly on the basis of her sex.

As to the fourth requirement, we recognize that a hostile environment in an educational setting is not created by a simple childish behavior or by an offensive utterance, comment, or vulgarity. Rather, Title IX is violated "when the [educational environment] is permeated with 'discriminatory intimidation, ridicule, and insult' that

is 'sufficiently severe or pervasive to alter the conditions of the victim's [environment] and create an abusive environment,' " Harris, 510 U.S. at —, 114 S.Ct. at 370 (quoting Meritor, 477 U.S. at 64-65, 106 S.Ct. at 2404 (internal citations omitted)). In determining whether a plaintiff has established that an environment is hostile or abusive, a court must be particularly concerned with (1) the frequency of the abusive conduct; (2) the conduct's severity; (3) whether it is physically threatening or humiliating rather than merely offensive; and (4) whether it unreasonably interferes with the plaintiff's performance. Id. at —, 114 S.Ct. at 371. The Court has explained that these factors must be viewed both objectively and subjectively. If the conduct is not so severe or pervasive that a reasonable person would find it hostile or abusive, it is beyond Title IX's purview. Similarly, if the plaintiff does not subjectively perceive the environment to be abusive, then the conduct has not actually altered the conditions of her learning environment, and there is no Title IX violation. Id. at — - —, 114 S.Ct. at 370-71.

Turning to the case before us in light of the relevant factors, we find the five months of alleged harassment sufficiently severe and pervasive to have altered the conditions of LaShonda's learning environment from both an objective and a subjective standpoint: (1) G.F. engaged in abusive conduct toward LaShonda on at least eight occasions; (2) the conduct was sufficiently severe to result in criminal charges against G.F.; (3) the conduct, such as the groping and requests for sex, was physically threatening and humiliating rather than merely offensive; and (4) the conduct unreasonably interfered with LaShonda's academic performance, resulting in the substantial deterioration of her grades and emotional health. The facts alleged go far beyond simple horseplay, childish vulgarities or adolescent flirting.

Finally, we consider the fifth and final element—whether any basis for the Board's liability has been shown. Under



Title VII, whether the harassing conduct of a supervisor or co-worker should be imputed to the employer is determined in accordance with common-law principles of agency. See *Meritor*, 477 U.S. at 72, 106 S.Ct. at 2408; *Murray*, 57 F.3d at 249. Under the agency theory of respondeat superior, this court holds employers liable for a hostile environment created by a co-worker where the plaintiff can show that "the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Henson*, 682 F.2d at 905. An employee can demonstrate that the employer knew of the harassment "by showing that she complained to higher management of the harassment or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Id.* (citation omitted).

In this case, Davis has alleged that she told the principal—a higher level manager—of the harassment on several occasions. She also alleged that at least three separate teachers, in addition to the principal, had actual and repetitive knowledge from LaShonda, her mother and other students. Finally, Davis alleged that despite this knowledge, the school officials failed to take prompt and remedial action to end the harassment.<sup>7</sup> These allegations regarding institutional liability, as well as the other allegations, are sufficient to establish a prima facie claim under Title IX for sexual discrimination due to the Board's failure to take action to remedy a sexually hostile environment.

#### IV. CONCLUSION

In light of the foregoing, we affirm the district court's judgment with the exception of its dismissal of the Title

<sup>7</sup> The complaint also alleged that during the time of the harassment, the Board had no policy prohibiting the sexual harassment of students in its schools, and had not provided any policies or training to its employees on how to respond to student-on-student sexual harassment.

IX claim against the Board. We reverse the district court's dismissal of that claim and remand for proceedings consistent herewith.

**AFFIRMED in part; REVERSED in part; REMANDED.**

**BIRCH**, Circuit Judge, concurring in part and dissenting in part:

Although I concur in the court's affirmance of the district court's dismissal of Davis's section 1983 claim, I disagree with the majority's holding that Davis's allegations state a valid claim against the Monroe County Board of Education under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1990 & Supp. 1995) ("Title IX").

This case does not involve allegations that an employee of the school district sexually harassed LaShonda D., but rather that the school district negligently failed to prevent another student from harassing LaShonda. The majority is correct in noting that the Supreme Court has held that "Title IX is enforceable through an implied right of action." *Franklin v. Gwinnett County Pub. Sch.* 503 U.S. 60, 65, 112 S.Ct. 1028, 1932, 117 L.Ed.2d 208 (1992) (citing *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)). However, *Franklin* involved a high-school student's allegations that a teacher had sexually harassed and assaulted her, and that school officials, who had actual knowledge of the teacher's conduct, failed to intervene. 503 U.S. at 63-64, 112 S.Ct. at 1031-32. The student-on-student sexual harassment alleged in this case is analytically quite distinct from that in *Franklin*, and the majority makes an unprecedented extension in holding that Title IX encompasses a claim of hostile environment sexual harassment based on the conduct of a student. There is not indication in the language

of Title IX that such a cause of action was intended to be covered by its scope; rather, the statute states that "[n]o person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). In this case, the school board, which is clearly an educational "program or activity" under 20 U.S.C. § 1687, is not alleged to have committed any act of harassment against LaShonda, nor is any employee of the school board. Rather, the plaintiff seeks to hold the school board liable for negligently failing to prevent another student, not its employee, from sexually harassing LaShonda. In my opinion, this student-on-student sexual harassment case clearly falls outside the purview of Title IX.

Even if I were to accept the majority's conclusion that Title IX encompasses student-on-student sexual harassment, I would limit that holding to intentional conduct on the part of the school board. Here, what is alleged is that the school board was negligent in failing to intervene to prevent the recurring student-on-student harassment. The majority relies on *Franklin* in reaching its conclusion that Title IX covers such behavior, even though the *Franklin* case involved intentional behavior on the part of a teacher; absent an indication to the contrary, *Franklin* should be limited to its facts. But rather than do this, the majority not only broadly reads it to cover student-to-student sexual harassment, but also to cover negligent behavior on the part of the school board.

Lastly, I would limit the remedy available to a plaintiff in the case of unintentional violations of Title IX to injunctive relief. *Franklin* involved intentional discrimination by the school board on the basis of sex, and thus involved an intentional violation of Title IX. The Supreme Court has held that in the case of intentional violations of Title IX, monetary damages are available to the victim of

the sexual harassment. *Franklin*, 503 U.S. at 73-75, 112 S.Ct. at 1037. What the Supreme Court did not decide in *Franklin*, however, was whether monetary damages are available in cases involving unintentional violations of Title IX. Most courts have interpreted Title IX along the same lines as similar statutes, such as Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4a (1994 & Supp. 1995). Since the Supreme Court has expressly found that Title VI does not support a monetary damages remedy for Title VI violations not involving intentional discrimination, *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 602-03, 103 S.Ct. 3221, 3232-33, 77 L.Ed.2d 866 (1983), we similarly should find that monetary damages are limited to intentional violations of Title IX.<sup>1</sup> Therefore, even if I were to accept the majority's argument that Title IX applies to the conduct at issue in this case, I would limit the remedy available to the plaintiff to injunctive relief.

Accordingly, I CONCUR in part and DISSENT in part.

<sup>1</sup> At least one federal district court has reached this conclusion as well. See *Doe v. Petaluma City Sch. Dist.* 830 F.Supp. 1560, 1571 (N.D.Cal.1993) (finding that "Title IX does prohibit hostile environment sexual harassment but that to obtain damages (as opposed to declaratory or injunctive relief), one must allege and prove intentional discrimination on the basis of sex by an employee of the educational institution"). The *Doe* court specifically held that "[t]o obtain damages, it is not enough that the institution knew or should have known of the hostile environment and failed to take appropriate action to end it." *Id.*



## APPENDIX C

UNITED STATES DISTRICT COURT  
M.D. GEORGIA  
MACON DIVISION

Civ. A. No. 94-140-4-MAC (WDO)

AURELIA D.,  
as Next Friend of LaShonda D.,  
Plaintiffs,

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,  
Defendants.

Aug. 29, 1994

## ORDER

OWENS, Chief Judge.

Plaintiff Ms. D. has brought suit on behalf of her daughter LaShonda against defendants the Monroe County School Board ("the Board"), Mr. Dumas, Superintendent of the Board, and Mr. Querry, Principal of Hubbard Elementary School concerning alleged harassment of LaShonda by a fellow classmate. Defendants have moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. In evaluating this motion, the court considered the facts as alleged in the complaint. After careful consideration of the arguments of counsel and the relevant statutes and case law, the court issues the following order.

## I. FACTS

Beginning about December 17, 1992, and continuing through May 19, 1993, LaShonda began to be harassed by a fellow fifth-grade student, G.F., during school hours. The harassment consisted of repeated attempts by G.F. to touch LaShonda's breasts and vaginal area, and use of vulgar language towards LaShonda.<sup>1</sup> G.F. spoke offensively towards LaShonda on or about January 2, 1993, and January 20, 1993. After each of these incidents, LaShonda notified her classroom teacher, Ms. Fort. Ms. D. called Ms. Fort to follow up on her daughter's complaints and Ms. Fort assured her that Principal Querry had been notified.

On February 3, 1993, while in gym class, G.F. placed a door stop in his pants and behaved in a sexually suggestive manner towards LaShonda. LaShonda reported this incident to her gym teacher. G.F. engaged in harassing behavior again on February 10, 1993, and on March 1, 1993, which LaShonda reported to her teachers. LaShonda and other girls who had been harassed by G.F. asked their teacher if they could go as a group to the principal's office but were not allowed to do so. On approximately April 12, 1993, while in a school hallway, G.F. rubbed his body against LaShonda in a suggestive manner. LaShonda once again notified her teacher of G.F.'s behavior.

On May 19, 1993, LaShonda complained to her mother that she did not know how much longer she could tolerate G.F.'s actions. When contacted by Ms. D, Mr. Querry said that we would "threaten the boy (G.F.) a little bit harder". Mr. Querry also asked why LaShonda "was the only one complaining". Ms. D. then called the Board's superintendent to complain about G.F. and Mr. Querry.

<sup>1</sup> The vulgar language included statements such as, "I want to get in bed with you" and "I want to feel your boobs".

The complaint further alleges that LaShonda's assigned seat in Ms. Fort's class was next to G.F.'s seat, but that she was not allowed to change seats until she had complained of the offensive behavior for over three months. Plaintiff also alleges that G.F. pled guilty to charges of sexual battery concerning the school incidents.

As a result of G.F.'s conduct, LaShonda's mental health and ability to concentrate were detrimentally affected and her grades declined. Plaintiff seeks to hold the school responsible under § 1983 and Title IX because they failed to discipline G.F. or otherwise act to curtail his conduct which proximately caused LaShonda's mental and emotional stress. Plaintiff alleges that the Board's failure to institute a policy concerning student-to-student sexual harassment proximately caused her daughter's distress.

In count two, plaintiff charges that the school engaged in racial discrimination when it disciplined G.F. for striking a white female student and not when he harassed LaShonda, a black female.

## II. DISMISSAL STANDARD

A motion to dismiss under Rule 12(b)(6) attacks the legal sufficiency of the complaint. A complaint should not be dismissed for failure to state a claim unless the plaintiff can prove no set of facts entitling him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232-33, 81 L.Ed.2d 59 (1984) (citing *Conley v. Gibson*, 335 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)); *Pataula Electric Membership Corp. v. Whitworth*, 951 F.2d 1238, 1240 (11th Cir.1992). The court is to presume true all of the complaint's allegations and make all reasonable inferences in favor of the plaintiff. *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 27 n. 2, 97 S.Ct. 2490, 2492 n. 2, 53 L.Ed.2d 557 (1977); *Linder v. Portocarrero*, 963 F.2d 332, 334 (11th Cir.1992); *Duke v. Cleland*, 5 F.3d 1399, 1402 (11th Cir.1993).

The rules require nothing more than "a short and plain statement" that will give the defendant fair notice of the claims and the grounds upon which they are based. *Conley*, 335 U.S. at 47, 78 S.Ct. at 103.

## III. DISCUSSION

### A. Section 1983—Failure to Protect Claim

The complaint alleges that the principal was responsible for supervising and disciplining students and that his failure to intervene and discipline G.F. or have a policy concerning sexual harassment of students proximately caused LaShonda's mental and emotional distress. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Plaintiff contends that defendants deprived LaShonda of her liberty interest in being free from sexual harassment and intrusions on her personal security by failing to adequately protect her from her classmate's unwanted advances. See *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977).

The constitutional guarantees limit the conduct of state actors. The state has no constitutional duty to protect its citizens from private persons. *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 195, 109 S.Ct. 998, 1002, 103 L.Ed.2d 249 (1989); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3rd Cir.1992), cert. denied, 506 U.S. 1079, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993).

Only where the state has acted to render the person incapable, or significantly less capable, of caring for or protecting himself does the state owe a duty of care to the individual. For example, when the state enters into a special relationship with a citizen, it may be held liable for failure to care for and protect him. See *Youngberg v.*



Romeo, 457 U.S. 307, 309, 102 S.Ct. 2452, 2454, 73 L.Ed.2d 28 (1982) (when a person is institutionalized and made dependent on the state, the state undertakes a duty to provide certain services to the person); *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (state required to provide adequate medical care to incarcerated prisoners). Section 1983 liability attaches only when the state breaches an affirmative duty which it owes to its citizens. See *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348, 353 (11th Cir.1989), cert. denied, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990). The Supreme Court has not extended the duty of care based upon a "special relationship with the state" beyond the cases of incarcerated prisoners and involuntarily committed mental patients. *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir.1990).

The state can also be charged with a duty of care where it places the individual in a dangerous situation or makes him more vulnerable to harm. *Cornelius*, 880 F.2d at 352; *Wood v. Ostrander*, 879 F.2d 583 (9th Cir.1989), cert. denied, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990). In *Wood*, an officer arrested an intoxicated driver and impounded his car, leaving his female passenger on the roadside in a high crime area at 2:30 a.m. The woman was raped by a man who offered her a ride home. The court found that under the facts alleged the officer owed the woman a duty not to be deliberately indifferent to her personal security. This duty arose because the officer acted to place her in danger. The common thread between cases where § 1983 liability has been imposed for harm inflicted by third parties is that the state affirmatively placed the individual in a position where he is significantly less able to care for himself than an ordinary citizen. The key factor is state control or custody over a person. See *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576, 1582 (N.D.Ga.1992).

In contrast to this line of cases, LaShonda has not alleged any special relationship between herself and the school, nor has she alleged that defendants placed her in a dangerous situation. In short, the state did not act to make her less capable of caring for herself. Plaintiff relies upon the mandatory attendance policy to support a special relationship between the school and its students. However, a number of other courts have rejected this suggestion. The Third Circuit, in *Middle Bucks*, reasoned that despite a mandatory attendance policy and the fact that a school has loco parentis authority over the children, students are not in state custody during school hours. *Middle Bucks*, 972 F.2d at 1371. In concluding that parents remain the primary caretakers of their children, the Third Circuit considered that parents decide whether to educate their children at home or in public or private schools, and that children are in school for a limited time and can turn to their parents for help each day. *Id.* The Seventh Circuit came to the same conclusion in *Alton*, 909 F.2d at 272-73. This court agrees with the reasoning in both *Middle Bucks* and *Alton*. LaShonda has not alleged facts from which any of the defendants owed her a duty of protection.<sup>2</sup> Accordingly, plaintiff's claim under § 1983 is **DISMISSED** for failure to state a claim upon which relief can be granted.

#### B. Qualified Immunity

State officials exercising discretionary powers are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or

<sup>2</sup> Plaintiff urges that defendants are liable under § 1983 because they failed to properly train LaShonda's teachers in deliberate indifference to her right to personal security. *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). However, *Canton* involved an allegation that police officers deliberately denied medical care to someone in their custody. The holding imposes no duty on the state to train state agents to prevent harm from private actors to persons not in state control or custody.

constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). "[A] necessary concomitant to the determination of whether a constitutional right . . . is clearly established at the time the defendant acted is the determination of whether the plaintiff has asserted a constitutional violation at all." *Siebert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). Having found that plaintiff has not alleged a deprivation of a constitutional right, defendants Dumas and Querry are entitled to qualified immunity. *Id.*

### C. Title IX

Plaintiff also alleges that the failure to protect LaShonda from her classmate's advances violated Title IX.<sup>3</sup> 20 U.S.C. § 1681, et seq. The Supreme Court has held that Title IX is enforceable through an implied right of action. *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60, 112 S.Ct. 1028, 1032, 117 L.Ed.2d 208 (1992). However, only federally-funded institutions can be held liable for violating the statute. *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir.1988). Accordingly, plaintiff's claims against individuals under Title IX are DISMISSED.

Moreover, plaintiff's claim against the Board has no basis in law. The sexually harassing behavior of a fellow fifth grader is not part of a school program or activity. Plaintiff does not allege that the Board or an employee of

<sup>3</sup> Title IX, 20 U.S.C. § 1681, prohibits discrimination on the basis of sex in the provision of educational services by federally-funded educational programs. Section 1681(a) provides that "[n]o person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." The definition of a "program or activity" includes "all of the operations of . . . a local educational agency . . . or other school system." 20 U.S.C. § 1687(2) (B).

the Board had any role in the harassment. — Thus any harm to LaShonda was not proximately caused by a federally-funded educational provider.

Another district court has suggested that a Title IX cause of action could be based upon allegations of a school's inaction in the face of complaints of student-to-student harassment where the inaction was intended to discriminate against the child on the basis of sex. *Doe v. Petaluma City Sch. Dist.*, 830 F.Supp. 1560, 1576 (N.D. Cal.1993). However, this court finds no basis for such a cause of action in Title IX or case law interpreting it.

### D. Section 1981—Racial Discrimination Claim

Principal Querry disciplined G.F. after he struck a white girl and plaintiff asserts that his failure to act accordingly when G.F. harassed LaShonda displayed the Board's intent to discriminate on the basis of race.<sup>4</sup> Complaint ¶ 31. The court finds that this allegation fails to state a cause of action against the Board under 42 U.S.C. § 1981.<sup>5</sup> To pursue a claim against the School Board under § 1981, plaintiff must show that the conduct was the result of a policy or custom of the Board.

The Civil Rights Act precludes imposition of liability on the basis of a supervisory position alone. *Jett. v. Indep. Sch. Dist.*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989); *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981); *Monell —v. Dept. of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A supervisory official may be held liable for a civil rights violation where it can be shown

<sup>4</sup> The complaint does not allege that Principal Querry had an intent to discriminate on the basis of race.

<sup>5</sup> The complaint states that the racially discriminatory actions violate "both the Education Act of 1972 and the Civil Rights Act of 1991." Since 29 U.S.C. § 1681, et seq., concerns gender discrimination, the court interprets this paragraph of the complaint as alleging a claim under 42 U.S.C. § 1981 alone.



that a constitutional violation has occurred as a direct result of a policy or procedure of the supervising official. Jett, 491 U.S. at 735-36, 109 S.Ct. at 2722-23.

Absent allegations that the Board had a policy of racial discrimination in the implementation of discipline, count two of the complaint fails to state a claim and should be DISMISSED.

#### IV. CONCLUSION

Not every tort can be remedied under federal law. Plaintiff, in both her § 1983 and Title IX claims, seeks to hold the school Board and the elementary principal responsible for the actions of a third party where neither plaintiff nor the third party is under the school's custody. The Due Process Clause does not "transform every tort committed by a state actor into a constitutional violation." DeShaney, 489 U.S. at 202, 109 S.Ct. at 1006 (quotations omitted).

Defendants' motion to dismiss the complaint in its entirety is GRANTED. The complaint is DISMISSED without prejudice.

SO ORDERED, this 29th day of August, 1994.

#### APPENDIX D

### UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

No. 94-9121

AURELIA DAVIS,  
as Next Friend of LaShonda D.,  
*Plaintiff-Appellant,*  
v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,  
*Defendants-Appellees.*

Appeal from the United States District Court  
for the Middle District of Georgia  
(No. 94-CV-140-4 MAC (WDO))  
Wilbur D. Owens, Jr., Judge

Aug. 1, 1996

#### ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before TJOFLAT, Chief Judge, and KRAVITCH,  
HATCHETT, ANDERSON, EDMONDSON, COX,  
BIRCH, DUBINA, BLACK, CARNES and BARKETT,  
Circuit Judges.\*

\* Senior U.S. Circuit Judge Albert J. Henderson has elected to participate in further proceedings in this matter pursuant to 28 U.S.C. § 46(c).

## BY THE COURT:

A member of this court in active service having requested a poll on the suggestion of rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

## APPENDIX E

[Filed May 4, 1994]

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
MACON DIVISION

Civil Action File No. 94-140-4-MAC

AURELIA DAVIS,  
a/n/f of LaShonda D.,

*Plaintiff*

vs.

MONROE COUNTY BOARD OF EDUCATION; CHARLES DUMAS, SUPERINTENDENT OF THE MONROE COUNTY BOARD OF EDUCATION; and BILL QUERRY, PRINCIPAL OF HUBBARD ELEMENTARY SCHOOL, all individually and in their official capacities,

*Defendants*

JURY TRIAL REQUESTED

*Introduction*

1.

Plaintiff is a citizen of Monroe County, Georgia and mother of her minor child LaShonda D., and files this action against Monroe County, the Monroe County Board of Education, Charles Dumas, Superintendent of the Monroe County Board of Education, individually and in his official capacity, and Bill Querry, Principal of Hubbard Elementary School, individually and in his official capacity for injunctive relief and compensatory damages.



2.

Plaintiff's child was subjected to sexual and racial discrimination under color of state law and in utter disregard for the rights guaranteed her under Title IX of the Education Amendments of 1972, and Title VII of the Civil Rights Act of 1964.

#### *Jurisdiction*

3.

This claim concerns the violation of civil rights and this court has jurisdiction pursuant to 28 U.S.C. § 1331 and 1343(3).

#### *Venue*

4.

Plaintiff and Defendants currently reside in Monroe County, Georgia, which is in this District and Division; the Plaintiff was a resident of Monroe County at the time the claims arose; the claims alleged arose in the Middle District. Accordingly, venue properly lies pursuant to 28 U.S.C. § 1391.

#### *Parties*

5.

Plaintiff AURELIA DAVIS sues in her capacity as next friend of her minor daughter LaShonda. She is a resident of 491 Stroud Street, Forsyth, Monroe County, Georgia.

6.

Defendants:

(1) MONROE COUNTY BOARD OF EDUCATION is responsible for formulating policies for the administration of all Monroe County public schools, including Hubbard Elementary School, and for the training and supervision of its employees in accordance with the authority granted in the Ga. Const. Art. VII, § 5, paras. 1 and 2,

and O.C.G.A. § 20-2-50. The Monroe County Board of Education may be served at P.O. Box 1308, Forsyth, Georgia 31029.

(2) Defendant CHARLES DUMAS is the superintendent of the Monroe County Board of Education. He is, and was at the time of the incidents complained of, responsible for overseeing the daily administration of the schools and carrying out the policies established by the Board of Education. Mr. Dumas may be served through the Monroe County Board of Education, P.O. Box 1308, Forsyth, Georgia 31029.

(3) Defendant BILL QUERRY is the principal of Hubbard Elementary School and is charged with carrying out the policies of the Board of Education within his school. He is also responsible for overseeing the discipline of the students of Hubbard Elementary School. Mr. Querry may be served at the Monroe County Board of Education, P.O. Box 1308, Forsyth, Georgia 31029.

All individual defendants are individually and severally responsible for the acts of sexual and racial discrimination.

By virtue of this Complaint and otherwise, all Defendants and their counsel are on notice of the claims against them and asked to identify and investigate such claims. All individual Defendants are sued in their official and individual capacities.

#### *Factual Allegations*

7.

On or about December 17, 1992, Plaintiff's minor daughter LaShonda, began to be harassed by a fellow fifth-grade student and classmate, G.F., while at school. This harassment has consisted of repeated attempts by G.F. to touch her breasts and vaginal area, and vulgar language by G.F. directed to LaShonda. G.F. has said such things to LaShonda as "I want to get in bed with you" and "I want to feel your boobs." Incidents such as this oc-

curred also on or about January 2, 1993, and on or about January 20, 1993. After each of these incidents LaShonda notified the classroom teacher, Mrs. Diane Fort. She also told her mother, who then called Mrs. Fort and was assured that the principal, Mr. Querry had been notified of this incident.

8.

On or about February 3, 1993, while in her P.E. class, G.F. placed a door stop in his pants and behaved in a sexually suggestive manner toward LaShonda. LaShonda reported this incident to the P.E. teacher, Coach Maples.

9.

These incidents of harassment also occurred while LaShonda and G.F. were under the supervision of other teachers. On or about February 10, 1993, G.F. harassed LaShonda in Mrs. Joyce Pippin's class. LaShonda again notified the teacher and Mrs. Davis called the teacher to follow up on her daughter's complaint.

10.

On or about March 1, 1993, G.F. again harassed LaShonda in Coach Whit Maples' P.E. class. LaShonda notified both the Coach and Mrs. Joyce Pippin. LaShonda and other girls who had been harassed by G.F. wanted to go as a group to Mr. Bill Querry, the principal, but were told by their teacher "If he wants you, he'll call you."

11.

On or about April 12, 1993, G.F. rubbed his body against LaShonda's in what she felt was a sexually suggestive way in the hall on the way to lunch. LaShonda called this to Mrs. Diane Fort, her teacher's attention.

12.

On or about May 19, 1993, approximately five months after the first incidents of harassment occurred, LaShonda,

after more of the same inappropriate behavior by G.F., came home and told her mother, the Plaintiff, that she "didn't know how much longer she could keep him off her." Mrs. Davis spoke to the principal of the school on or about May 19, 1993 to see what action would be taken and was told, "I guess I'll have to threaten him (G.F.) a little bit harder." During this conversation, Mr. Querry asked LaShonda "why she was the only one complaining."

13.

At all times during these incidents LaShonda's assigned seat in Mrs. Diane Fort's class was next to G.F.'s. LaShonda asked several times to be moved to a different seat to remove herself from contact with G.F., but she was not allowed to change seats until complaining for over three months.

14.

As a result of G.F.'s conduct on May 19, 1993 brought about by the school's failure to act, G.F. was charged with and pled guilty to sexual battery.

15.

This constant harassment has been detrimental to LaShonda's mental health. LaShonda's ability to concentrate on her school work has been affected by her constant efforts to fend off G.F.'s advances. LaShonda's grades, previously all A's and B's, dropped as a result of this harassment by G.F. In April of 1993, in the midst of these occurrences of harassment, LaShonda's father found a suicide note that LaShonda had written.

16.

In addition to harassing LaShonda, G.F. behaved in a similar manner toward other girls in the class. At no time during this period of constant harassment was G.F. suspended, kept away from LaShonda, or disciplined in any way even after repeated complaints by LaShonda and her



98a

mother. However, G.F. was suspended for slapping another child, who was white.

17.

The Monroe County School Board, at the time of these incidents, had no policy to guide its employees and had given its employees no training in responding to an occurrence of sexual harassment of a student. Neither the Teacher's Handbook, nor the Board Policy Manual provide a plan of action or any guidance in handling instances of sexual harassment of students, nor even addresses the problem of sexual harassment of students.

18.

The Monroe County Board of Education, in their failure to have a policy concerning sexual harassment of students and in their failure to respond to the complaints of this student, was willfully and deliberately indifferent to the needs of this black female student. The Board of Education knew or should have known that the failure to implement a policy providing guidance for teachers and other employees in responding to sexual harassment claims by students would result in a violation of students' clearly established right to be free from sexual and racial discrimination.

19.

Defendant Querry was responsible for supervising discipline of the students in his school and for determining whether students should be suspended. He knew or should have known that Plaintiff's daughter would be harmed by his failure to intervene and prevent sexual harassment of LaShonda by G.F.

20.

Defendant Bill Querry's refusal to act against G.F. demonstrated his callous disregard for the rights of this black female student.

99a

*Relief Sought*

*Statutory Violations*

*COUNT I*

Sex Discrimination Pursuant to Title IX of the Education Amendments of 1972 codified at 20 U.S.C. § 1681, *et seq.* (1982).

21.

Plaintiff realleges paragraphs 1 through 20 above.

22.

Defendant Monroe County Board of Education, at all times relevant to this action, has been and remains a local education agency (LEA) as defined by § 1000(f) of the Elementary and Secondary Act of 1965 (codified at 20 U.S.C. § 3381), and the regulations contained at 34 C.F.R. § 106.2(j) (1988).

23.

Defendant Monroe County Board of Education is the recipient of federal financial assistance as the terms "recipient" and "federal financial assistance" have been defined in the regulations contained at 34 C.F.R. § 106.2 (g) and (h) (1988).

24.

Defendant Monroe County Board of Education is subject to the prohibitions of the Education Amendments of 1972, as codified at 20 U.S.C. § 1681, and has, upon information and belief, provided satisfactory assurance of compliance with the anti-discrimination provisions of the Education Amendments of 1972 to Assistant Secretary of Civil Rights of the United States Department of Education.

25.

Hubbard Elementary School is an elementary school within the administrative control and direction of Defend-

ant Monroe County Board of Education, Defendant Charles Dumas, and Defendant Bill Querry, and all operations of said Hubbard Elementary School are part of the education program and activity contemplated within the meaning of 20 U.S.C. § 1681 by virtue of § 3(a) of the Civil Rights Registration Act of 1987 (codified at 20 U.S.C. § 1687).

26.

The Monroe County Board of Education is not immune under the Eleventh Amendment of the Constitution of the United States from a suit in the Federal Court for violation of Title IX of the Education Amendments of 1972, Chapter 39, 886 Stat. 235 (1972), (codified at 20 U.S.C. § 1681, et seq. (1982)), since the acts complained of herein occurred subsequent to October 21, 1986.

27.

The persistent sexual advances and harassment by the student G.F. upon Plaintiff interfered with her ability to attend school and perform her studies and activities. Had Defendant Bill Querry intervened as was necessary, the injury to LaShonda would have been mitigated and the situation would have been ended.

28.

The deliberate indifference by Defendants to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abuse school environment in violation of Title IX of the Education Amendments of 1972, Chapter 39, 886 Stat. 235 (1972), (codified at 20 U.S.C. § 1681, et seq. (1982)).

29.

The Defendants' indifference to the needs of female students and the needs of LaShonda specifically was deliberate and done under color of state law. Defendants' failure to take action resulted in extreme emotional damage

to LaShonda. This conduct gives rise to claims under the aforementioned statutes as well as pursuant to 42 U.S.C. § 1983 for injunctive relief and for money damages in the amount of \$500,000.00 as a direct result of deliberate indifference and intentional discrimination against LaShonda by employees of the Defendant Monroe County Board of Education.

## COUNT II

### Discrimination based on Race.

30.

Plaintiff realleges paragraphs 1 through 29 above.

31.

Defendant Bill Querry's, an employee of Defendant Monroe County Board of Education, actions against G.F. to suspend him after striking a white student and his decision not to act when the same student G.F. assaulted a black student evidences willful and intentional racial discrimination on the part of the Monroe County Board of Education in violation of both the Education Act of 1972 and the Civil Rights Act of 1991.

32.

Plaintiff should have and recover compensatory, general, and punitive damages from Defendants Monroe County Board of Education, Charles Dumas and Bill Querry, for their willful and intentional violation of the civil rights of LaShonda based on her race in the amount of money damages for \$500,000.00 and for her request of injunctive relief that no further female black students be treated accordingly.

WHEREFORE, Plaintiff prays the Court as follows:

- (a) to take jurisdiction of this matter;
- (b) grant a trial by jury;



(c) award Plaintiff actual compensatory damages in the amount of \$1,000,000.00 against all Defendants and award punitive damages against the individual Defendants under each claim stated above in such amounts as the jury determines to be just;

(d) reasonable attorney's fees pursuant to 42 U.S.C. § 1988;

(e) order the Monroe County Board of Education to institute a policy providing guidance for employees in the event of sexual harassment of students by fellow students;

(f) enjoin the Monroe County Board of Education from discriminating against female students by failing to respond to complaints of sexual harassment;

(g) enjoin the Monroe County Board of Education from discriminating against black female students by failing to respond to complaints of sexual harassment for physical assault by fellow students.

RESPECTFULLY SUBMITTED, this 4th day of May, 1994.

/s/ Debra G. Gomez  
DEBRA G. GOMEZ  
Georgia State Bar No. 300509

/s/ Mary P. Sullivan  
MARY P. SULLIVAN  
Georgia State Bar No. 691427

DEC 22 1997

CLERK

(2)  
No. 97-843

In The  
**Supreme Court of the United States**  
October Term, 1997

— ♦ —  
AURELIA DAVIS,  
as next friend of LASHONDA D.,

*Petitioner,*

v.

MONROE COUNTY BOARD OF  
EDUCATION, *et al.*,

*Respondents.*

— ♦ —  
On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit

— ♦ —  
**RESPONDENTS' BRIEF IN OPPOSITION**  
— ♦ —

W. WARREN PLOWDEN, JR.\*  
WILLIAM T. PRESCOTT  
JONES, CORK & MILLER  
435 Second St., Suite 500  
P.O. Box 6437  
Macon, GA 31208-6437  
(912) 745-2821

*Attorneys for Respondents*

*\*Counsel of Record*



**QUESTION PRESENTED**

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which was enacted pursuant to the Spending Clause of Article I of the United States Constitution, encompasses a cause of action against a school district receiving federal funds based upon a claim of student-to-student sexual harassment under a hostile environment negligence theory.<sup>1</sup>

---

<sup>1</sup> Petitioner has identified two Questions Presented in her Petition for Writ of Certiorari. However, Petitioner's second Question Presented, "Whether the legal principles regarding sexual harassment that have developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, should be applied to analyze claims of sexual harassment under Title IX of the Education Amendments of 1972," was not decided by the Eleventh Circuit Court of Appeals in its *en banc* opinion in *Davis v. Monroe County Board of Education*, 120 F.3d 130 (11th Cir. 1997) from which Petitioner appeals. Accordingly, Petitioner's second Question Presented is not properly before the court. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
RESPONDENTS' BRIEF IN OPPOSITION.....	1
STATEMENT OF CASE.....	1
I. STATEMENT OF FACTS.....	1
II. PROCEEDINGS BELOW.....	1
REASONS WHY THE PETITION SHOULD BE DENIED.....	4
I. THERE IS NO SPLIT AMONG THE CIRCUIT COURTS REGARDING WHETHER SCHOOL DISTRICTS CAN BE HELD LIABLE FOR STUDENT-TO-STUDENT SEXUAL HARASSMENT UNDER TITLE IX.....	4
II. THERE IS NO SPLIT AMONG THE CIRCUIT COURTS REGARDING WHETHER TITLE VII PRINCIPLES SHOULD GUIDE COURTS IN DETERMINING A SCHOOL DISTRICT'S LIABILITY IN STUDENT-TO-STUDENT SEXUAL HARASSMENT CASES UNDER TITLE IX.....	8
III. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.....	11
IV. THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN <i>FRANKLIN</i> .....	13
CONCLUSION.....	15

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Bougher v. University of Pittsburgh</i> , 713 F. Supp. 139 (W.D. Pa. 1989).....	15
<i>Brown v. Hot, Sexy and Safer Prods., Inc.</i> , 68 F.3d 525 (1st Cir. 1995).....	7, 9
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979).....	11, 13
<i>City of Canton, Ohio v. Harris</i> , 489 U.S. 378 (1989).....	i
<i>Davis v. Monroe County Bd. of Educ.</i> , 120 F.3d 130 (11th Cir. 1997).....	i, 1, 3
<i>Davis v. Monroe County Bd. of Educ.</i> , 74 F.3d 1186, vacated and reh'g en banc granted, 91 F.3d 1418 (11th Cir. 1996).....	2, 3
<i>Davis v. Monroe County Bd. of Educ.</i> , 862 F. Supp. 363 (M.D. Ga. 1994).....	2
<i>DeShaney v. Winnebago County Dept. of Soc. Servs.</i> , 489 U.S. 189 (1989).....	2
<i>Doe v. Claiborne County</i> , 103 F.3d 495 (6th Cir. 1996).....	9
<i>Floyd v. Waiters</i> , 831 F. Supp. 867 (M.D. Ga. 1993).....	10
<i>Franklin v. Gwinnett County Pub. Sch.</i> , 503 U.S. 60 (1992).....	6, 12, 13, 14, 15
<i>Guardians Ass'n v. Civil Service Comm'n</i> , 463 U.S. 582 (1983).....	11, 13
<i>J.W. v. Bryan Independent School District</i> , ___ U.S. ___, 117 S.Ct. 1694 (1997).....	8
<i>Kinman v. Omaha Pub. Sch. Dist.</i> , 94 F.3d 463 (8th Cir. 1996).....	9



## TABLE OF AUTHORITIES – Continued

	Page
<i>Krancus v. Iona College</i> , 119 F.3d 80 (2nd Cir. 1997) .....	9
<i>Lipsett v. University of Puerto Rico</i> , 864 F.2d 881 (1st Cir. 1988) .....	9
<i>Meritor Savings Bank v. Vinson</i> , 477 U.S. 57 (1986) ...	10, 14
<i>Murray v. New York University College of Dentistry</i> , 57 F.3d 243 (2d Cir. 1995) .....	8, 10
<i>Oona, R.S. v. McCaffrey</i> , 122 F.3d 1207 (9th Cir. 1997) .....	6, 7
<i>Pennhurst State School and Hospital v. Halderman</i> , 451 U.S. 1 (1981) .....	11, 13, 14
<i>Rowinsky v. Bryan Ind. Sch. Dist.</i> , 80 F.3d 1006, cert. denied, ___ U.S. ___, 117 S.Ct. 165, 136 L.Ed.2d 108 (1996) .....	5, 8, 13, 15
<i>Seamons v. Snow</i> , 84 F.3d 1226 (10th Cir. 1996) .....	7
<i>Seamons v. Snow</i> , 864 F. Supp. 1111 (D. Utah 1994) ....	10

## STATUTES

Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 .....	<i>passim</i>
42 U.S.C. § 1983 .....	1, 2, 6, 7
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e <i>et seq.</i> .....	<i>passim</i>
Title VI of the Civil Rights Act of 1965, 42 U.S.C. § 2000d <i>et seq.</i> .....	11

## RULES

Fed. R. Civ. P. 12(b)(6) .....	1
--------------------------------	---

## RESPONDENTS' BRIEF IN OPPOSITION

Respondents Monroe County Board of Education, *et al.*, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Eleventh Circuit's decision in this case. The decision is reported at 120 F.3d 130 (11th Cir. 1997).

## STATEMENT OF THE CASE

## I. STATEMENT OF FACTS

Petitioner Davis' complaint alleged that beginning on or about December 17, 1992 and continuing through May 19, 1993, Petitioner's daughter Lashonda D. suffered hostile environment sexual harassment at the hands of a fellow fifth grade student and classmate, G.F. The complaint alleged that each incident was reported to a teacher and the principal, but that no action was taken against G.F. Because Petitioner's complaint was dismissed pursuant to Fed. R. Civ. P. 12(b)(6), the factual record has not been developed. However, the specifics of Petitioner's allegations are set forth in Petitioner's complaint which is reproduced on pages 93a through 102a of Petitioner's Petition for Writ of Certiorari.

## II. PROCEEDINGS BELOW

Petitioner Aurelia Davis, a/n/f of LaShonda D., filed a complaint against the Monroe County Board of Education, the Superintendent of Monroe County Schools Charles E. Dumas, and Hubbard Elementary School Principal Bill Querry alleging claims under 42 U.S.C. § 1983

and Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

Respondents moved to dismiss, contending that Petitioner's complaint failed to state a claim for which relief could be granted under either Title IX or § 1983. The district court dismissed Petitioner's complaint finding that under this Court's decision in *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989), Respondents had no constitutional duty to protect LaShonda D. from the actions of a third party absent the existence of a special relationship. *Davis v. Monroe County Board of Education et al.*, 862 F. Supp. 363 (M.D. Ga. 1994).

The district court further held that Petitioner's Title IX claim had no basis in law because Petitioner did not allege that the Board had any role in the harassment and because the sexually harassing behavior of a fellow fifth grader was not part of a school program or activity. *Id.* at 367. Petitioner filed her Notice of Appeal to the Eleventh Circuit Court of Appeals.

A panel of the Eleventh Circuit unanimously affirmed the dismissal of Petitioner's § 1983 claims without discussion. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996). However, a divided panel reversed the district court's finding that Title IX did not provide a cause of action for student-to-student sexual harassment based upon a hostile environment negligence theory and held that "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising

authorities knowingly fail to act to eliminate the harassment." *Id.* at 1193.

Judge Birch dissented from the majority's holding stating that the majority made an "unprecedented extension in holding that Title IX encompasses a claim of hostile environment sexual harassment based on the conduct of a student." *Id.* at 1196. Judge Birch argued that the language of Title IX does not indicate that such a cause of action was intended to be covered by its scope. *Id.*

Judge Birch further argued that even if Title IX encompasses student-to-student sexual harassment, it should only cover intentional conduct on the part of the school board rather than a claim for negligent failure to intervene to prevent sexual harassment as alleged by Petitioner. *Id.* Finally, Judge Birch argued that the remedy available for unintentional violations of Title IX should be limited to injunctive relief based upon this Court's precedent holding that Title VI (and therefore Title IX) does not support a monetary damages remedy for unintentional discrimination. *Id.*

Respondents timely filed a petition for rehearing *en banc* which was granted by the Eleventh Circuit on August 1, 1996. *Davis v. Monroe County Bd. of Educ.*, 91 F.3d 1418 (11th Cir. 1996). On August 21, 1997 the Eleventh Circuit, sitting *en banc*, held that Title IX does not provide a cause of action for student-to-student sexual harassment. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997). The Eleventh Circuit held that Title IX was enacted pursuant to the Spending Clause and therefore must unambiguously disclose to would-be



recipients all facts material to their decision to accept federal funding. *Id.* at 1406. The Eleventh Circuit held that Petitioner's complaint failed to state a claim under Title IX because Congress gave no clear notice to schools and teachers that they would accept responsibility for remedying student-to-student sexual harassment when they chose to accept federal financial assistance under Title IX. *Id.*

Contrary to Petitioner's assertion, the Eleventh Circuit did not hold that "legal principles regarding sexual harassment that have developed under Title VII are not applicable to Title IX claims of sexual harassment." (Petitioner's Brief, p. 5.) Although, the Eleventh Circuit mentioned the appropriateness of applying Title VII principles to claims of student-to-student sexual harassment brought under Title IX, the Eleventh Circuit never reached the merits of that issue. Accordingly, this Court's decision on whether to grant Petitioner's Petition for Writ of Certiorari should focus on the correctness of the Eleventh Circuit's holding that a claim for student-to-student sexual harassment could not be brought under Title IX.

---

#### REASONS WHY THE PETITION SHOULD BE DENIED

##### I. THERE IS NO SPLIT AMONG THE CIRCUIT COURTS REGARDING WHETHER SCHOOL DISTRICTS CAN BE HELD LIABLE FOR STUDENT-TO-STUDENT SEXUAL HARASSMENT UNDER TITLE IX.

Contrary to Petitioner's assertion, there is no split among the circuits that have addressed the issue of

whether Title IX provides a cause of action against school districts receiving federal funds for student-to-student sexual harassment. The only Circuits to squarely address this issue are the Fifth Circuit and the Eleventh Circuit. Both Circuits have held that Title IX does not provide a cause of action for student-to-student sexual harassment.

In *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 165, 136 L.Ed.2d 108 (1996), the Fifth Circuit held that Title IX does not create a cause of action for hostile environment sexual harassment based upon the conduct of one student toward another student. *Id.* at 1013. Like the Eleventh Circuit in this case, the Fifth Circuit held that Title IX is a funding statute enacted pursuant to Congress's spending power. *Id.* "As an exercise of Congress's spending power, Title IX makes funds available to recipient in return for the recipient's adherence to the conditions of the grant." *Id.* at 1012-13. The Fifth Circuit found that imposing liability upon grant recipients for the acts of third parties would be incompatible with the purpose of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of Title IX. *Id.* at 1013. Consequently, the Fifth Circuit found that Title IX applies only to the practices of grant recipients themselves. *Id.*

The Eleventh Circuit's ruling reaches no further than the Fifth Circuit's holding in *Rowinsky*. While the Fifth Circuit stated that a school district *might* violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, that language is merely dicta.

Nevertheless, Petitioner's assertion that the Eleventh Circuit's reasoning in this case would foreclose liability under the scenario where a school responds differently to peer sexual harassment based upon the gender of the complainant is wrong. Under that scenario a school district would be held liable, not for an act of harassment by a third party, but for its own discriminatory action in treating the complaints of males and females differently.

In a feeble attempt to create conflict where none exist, Petitioner contends that in *Oona, R.S. v. McCaffrey*, 122 F.3d 1207 (9th Cir. 1997), "the court held that school officials did not have qualified immunity in a peer sexual harassment case based on conduct that occurred in 1992, because it was clearly established, as of this Court's decision in *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), that Title IX requires schools to take prompt and appropriate action to remedy a hostile environment created by students." The Ninth Circuit did not so hold.

In *Oona*, the Ninth Circuit was confronted with the question of whether school officials were entitled to qualified immunity under 42 U.S.C. § 1983 where they were being sued by a female student who alleged that she was sexually harassed by a student teacher. The Ninth Circuit held that the school officials were not entitled to qualified immunity under § 1983 based upon this Court's statement in *Franklin* that a school district might be liable in a situation where a teacher sexually harasses a student. *Oona* at 1209-1211. The Ninth Circuit held that a student's right to be free from sexual harassment by a teacher was clearly established at the time *Oona* was being harassed

in 1992 and therefore the school district had a duty to act. *Id.* at 1210.

The Ninth Circuit's holding centered on the school district's alleged failure to supervise a student teacher who was allegedly harassing *Oona*. *Id.* at 1210-1211. The Ninth Circuit specifically stated, "[w]e do not consider what steps school officials may reasonably be required to take to prevent harassment by fellow students." *Id.* Thus, contrary to Petitioner's assertion the Ninth Circuit did not hold that Title IX requires schools to take prompt and appropriate action to remedy a hostile environment created by students. Consequently, the Ninth Circuit's opinion in *Oona*, which addressed only the issue of qualified immunity under § 1983, does not create a conflict among the circuit courts.

Likewise, the other cases cited by Petitioner present no conflict. In *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), a football player was subjected to a sexually explicit hazing incident by other football players. The Tenth Circuit rejected the student's claim because he failed to show the school official's conduct in addressing the incident was based upon sex. Moreover, the Tenth Circuit specifically declined to decide "what liability, if any, the school district might have for the acts of its students" or whether negligence would be a sufficient basis on which to impose liability. *Id.* at 1332 n.7.

*Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995), is factually distinguishable from this case. *Brown* involved a mandatory school-sponsored assembly on AIDS awareness that contained sexually explicit skits. Although the First Circuit recognized the concept of a



school-created "hostile environment," it found the plaintiff's allegations insufficient to state a claim.

*Murray v. New York Univ. College of Dentistry*, 57 F.3d 243 (2nd Cir. 1995), involved an allegation by an adult dental student that she was being harassed by a patient at the clinic where she worked. The Second Circuit failed to reach the question of whether an entity could be held liable under Title IX or Title VII for failing to prevent harassment by a non-agent. *Id.* at 250. Rather, the Second Circuit determined that the plaintiff's allegations failed to state a claim under either statute.

Accordingly, no conflict among the Circuit Courts presently exists on this issue. While Respondent recognizes that various district courts have disagreed on this issue, the existence of disagreement in the district court does not merit granting the Petition. This Court denied a petition for writ of certiorari in *Rowinsky*. This Court also denied a petition for writ of certiorari in *J.W. v. Bryan Independent School District*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 1694 (1997), an unreported Fifth Circuit case involving a claim of student-to-student sexual harassment under Title IX. This Court should also deny the writ in this case as the Eleventh Circuit's opinion is consistent with, and reaches no further than, the Fifth Circuit's opinion in *Rowinsky*.

## II. THERE IS NO SPLIT AMONG THE CIRCUIT COURTS REGARDING WHETHER TITLE VII PRINCIPLES SHOULD GUIDE COURTS IN DETERMINING A SCHOOL DISTRICT'S LIABILITY IN STUDENT-TO-STUDENT SEXUAL HARASSMENT CASES UNDER TITLE IX.

As stated above, the Eleventh Circuit never reached the merits of whether Title VII principles should apply to

a claim of student-to-student sexual harassment. Consequently, that issue is not properly before the Court. The Eleventh Circuit's opinion held that Petitioner could not bring an action for student-to-student sexual harassment under Title IX. This Court should base its determination to deny or grant the Petition solely on the correctness of that holding.

Nevertheless, the cases upon which Petitioner relies to demonstrate a "conflict" among the Circuits are factually distinguishable from this case. None of the cases relied upon by Petitioner involved the application of Title VII principles to a case of student-to-student sexual harassment. *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), was an employment case in which the court specifically held that its holding was limited to the employment context and noted that the action was limited to declaratory and injunctive relief. *Id.* at 884 n.3, 897. *Krancus v. Iona College*, 119 F.3d 80 (2nd Cir. 1997), involved a claim by two college students, one of whom was also an employee of the college, that they had been sexually harassed by a professor. Likewise, *Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996), *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996) and *Oona*, all involved allegations by a student that they were sexually harassed by a teacher. As stated above, the *Brown* case involved allegations that the school district had created a sexually hostile environment by sponsoring a school assembly on AIDS that involved sexually explicit skits. Therefore, all of those cases are inapposite.

Further, contrary to the implication in Petitioner's brief, the Second Circuit has not found that Title VII principles apply to a plaintiff's complaint that she had

been subjected to a sexually hostile educational environment by a patient. In *Murray v. New York University College of Dentistry*, the court specifically reserved ruling on the question of whether the "knew or should have known" standard of Title VII should be extended to a hostile environment that is allegedly created by a third party under Title IX. *Id.* at 250.

Moreover, Petitioner's reliance upon the opinions in the cases cited above ignores a basic distinction between Title VII and Title IX which makes the holdings in those cases in-applicable to a claim of student-to-student sexual harassment. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), this Court concluded that common-law agency principles apply in determining whether an employer is liable for the acts of its employees because Title VII defines "employer" to include "any agent of such a person". 42 U.S.C. § 2000e(b). Title IX prohibits discrimination by an "education program or activity." 20 U.S.C. § 1681. Unlike the term "employer" in Title VII, Congress did not define "education program or activity" to include "agents" of the "program or activity." *Seamons v. Snow*, 864 F. Supp. at 1116, n.1. (Title IX contains no agency provision); *Floyd v. Waiters*, 831 F. Supp. 867, 876 (M.D. Ga. 1993) (agency principles do not apply to claims under Title IX). Inasmuch as this Court in *Meritor* held that agency principles determine whether an employer is liable under Title VII for acts of sexual harassment committed by its employees based upon its definition of "employer", and Title IX does not contain an agency provision, it follows that cases involving claims against an entity based on the conduct of its employee as the harasser cannot create a conflict

among the Circuit Courts for the purpose of this case which does not involve an allegation that an agent of the entity was the harasser.

None of the cases relied upon by Petitioner addresses the issue of whether Title VII principles should apply to a claim for student-to-student sexual harassment under Title IX. Accordingly, no conflict is created among the Circuit Courts by the Eleventh Circuit's mentioning the appropriateness of applying Title VII principles to such claims brought under Title IX. Again, the fact that there might be differing opinions among the district courts as to whether Title VII principles should apply to claims of student-to-student sexual harassment is not a sound basis for this Court to grant the writ.

### III. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.

Contrary to Petitioner's assertion, the Eleventh Circuit has construed Title IX in a manner that is consistent with the prior decisions of this Court concerning Spending Clause legislation. Title IX was enacted pursuant to the Spending Clause and was patterned after Title VI which prohibits intentional race based discrimination. *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983). The Spending Clause enables Congress to place conditions on the receipt of federal funds by grantees. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The legitimacy of the power is the *voluntary* and *knowing* acceptance of the conditions by the grantee. *Id.* at 17. This



Court has held that "there can of course be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal money, it must do so *unambiguously*." *Id.* (Emphasis added.) This Court reasoned that because the recipient of federal aid voluntarily consents to accept the aid and consequent federal requirements, the recipient *should not* be held liable for compensatory damages for an unintentional violation of Title IX absent notice that it is committing some act in violation of the federal requirements. *Id.*; *Franklin*, 503 U.S. at 74.

Title IX provides in relevant part:

No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). The plain language of Title IX does not *expressly* create a cause of action for hostile environment sexual harassment based upon the conduct of one student toward another student. Moreover, nothing in the language of Title IX, the legislative history of Title IX or the regulations enforcing Title IX at the time the incidents in Petitioner's complaint allegedly occurred, served to put the school district on notice that it had an obligation to protect Petitioner from the actions of a fellow student, much less that it would be subject to monetary damages for negligently failing to protect Petitioner from the actions of another student.

Additionally, although Petitioner argues that the Eleventh Circuit's holding unreasonably restricts the application of Title IX, the legislative history of Title IX shows that both supporters and opponents of Title IX focused exclusively on the acts of grant recipients. This Court's opinions in *Guardians*, *Cannon*, *Pennhurst*, and other Spending Clause cases have focused on the policies and actions of the grant recipient itself. Nothing in prior Title IX jurisprudence discussed the liability of a school district for the actions of a third party who is not its agent.

The Eleventh Circuit correctly held that in a case such as this, where the conduct giving rise to injury is not that of the entity, justice and this Court's prior opinions, require that the entity receiving federal aid be aware of all of the obligations to be imposed upon it before it can be held liable in money damages. The Fifth Circuit so found in *Rowinsky*, and this Court denied the petition for writ of certiorari in that case. The Court should likewise deny the Petition in this case.

#### IV. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *FRANKLIN*.

Petitioner's contention that the Eleventh Circuit's decision conflicts with this Court's holding in *Franklin* is simply wrong. In *Franklin*, this Court stated:

Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on

the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe.

*Franklin*, 503 U.S. at 75. (Emphasis added). The comment quoted above was made by this Court in explaining its refusal to apply its holding in *Pennhurst*, which limits the remedies available under Spending Clause statutes when the alleged violation is unintentional, to intentional violations. This Court was not called upon and did not decide the circumstances under which an entity can be held liable under Title IX. Moreover, this Court did not use Title VII principles to analyze Title IX claims, or hold that a cause of action for teacher-to-student sexual harassment exists under Title IX.

Moreover, even if *Franklin* holds as Petitioner suggests, the harasser in *Franklin* was an employee of the school district. In this case neither the school district, nor any of its employees is alleged to have committed any act of harassment against LaShonda. Petitioner seeks to hold the school district liable for its alleged negligent failure to prevent another student, not its employee, from harassing Lashonda. "To suggest, as [Petitioner] must, that unwelcome sexual advances, from *whatever* source, official or unofficial, constitute Title IX violations is a leap into the unknown which, whatever its wisdom, is the

duty of Congress . . . to take." *Bougher v. University of Pittsburgh*, 713 F. Supp. 139, 145 (W.D. Pa. 1989).

The Eleventh Circuit's decision is completely consistent with this Court's holding in *Franklin* and other controlling precedent of this Court.

---

### CONCLUSION

As stated previously, this Court denied a petition for writ of certiorari in the *Rowinsky* case which was decided by the Fifth Circuit on the same basis as the Eleventh Circuit's opinion in this case. Accordingly, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 19th day of December, 1997.

W. WARREN PLOWDEN, JR.\*  
 WILLIAM T. PRESCOTT  
 JONES, CORK & MILLER  
 435 Second St., Suite 500  
 P.O. Box 6437  
 Macon, GA 31208-6437  
 (912) 745-2821

\*Counsel of Record

Attorneys for Respondents



(A)  
No. 97-843

Supreme Court, U.S.

FILED

JAN 6 1998

CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

AURELIA DAVIS, as next friend of LASHONDA D.,  
*Petitioner,*

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,  
*Respondents.*

On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

MARCIA D. GREENBERGER  
VERNA L. WILLIAMS \*  
DEBORAH L. BRAKE  
NEENA K. CHAUDHRY  
NATIONAL WOMEN'S LAW CENTER  
11 Dupont Circle, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 588-5180  
*Attorneys for Petitioner*

January 6, 1998

\* Counsel of Record

8 p4

# TABLE OF AUTHORITIES

CASES:	Page
<i>Brown v. Hot, Sexy &amp; Safer Prods., Inc.</i> , 68 F.3d 525 (1st Cir. 1996) .....	4, 6
<i>Brzonkala v. Virginia Polytechnic Inst. and State Univ.</i> , No. 96-1814, 1997 U.S. App. LEXIS 35970 (4th Cir. Dec. 23, 1997) .....	1, 3, 4
<i>Davis v. Monroe County Bd. of Educ.</i> , 120 F.3d 1390 (11th Cir. 1997) .....	4, 5
<i>Doe v. Claiborne County</i> , 103 F.3d 495 (6th Cir. 1996) .....	4
<i>Doe v. Petaluma Sch. Dist.</i> , 54 F.3d 1447 (9th Cir. 1995) .....	2
<i>Franklin v. Gwinnett County Pub. Schs.</i> , 503 U.S. 60 (1992) .....	2, 4, 6
<i>Kinman v. Omaha Pub. Sch. Dist.</i> , 94 F.3d 463 (8th Cir. 1996) .....	4
<i>Kracunas v. Iona College</i> , 119 F.3d 80 (2d Cir. 1997) .....	5
<i>Lipsett v. University of Puerto Rico</i> , 864 F.2d 881 (1st Cir. 1988) .....	4, 5, 6
<i>Murray v. New York Univ. College of Dentistry</i> , 57 F.3d 243 (2d Cir. 1995) .....	4, 5
<i>Oona, R.S. v. McCaffrey</i> , 122 F.3d 1207 (9th Cir. 1997) .....	2, 3, 4
<i>Rowinsky v. Bryan Indep. Sch. Dist.</i> , 80 F.3d 1006 (5th Cir. 1996) .....	4
<i>Seamons v. Snow</i> , 84 F.3d 1226 (10th Cir. 1996) ....	4
STATUTES AND REGULATIONS:	
42 U.S.C. § 1983 .....	2



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

---

No. 97-843

---

AURELIA DAVIS, as next friend of LASHONDA D.,  
*Petitioner,*

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,  
*Respondents.*

---

On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

---

REPLY TO BRIEF IN OPPOSITION

---

1. Shortly after the Petition for Writ of Certiorari was filed in this case, the United States Court of Appeals for the Fourth Circuit decided a student-to-student sexual harassment case, *Brzonkala v. Virginia Polytechnic Institute and State University* ("VPI"), No. 96-1814, 1997 U.S. App. LEXIS 35970 (4th Cir. Dec. 23, 1997), which exacerbates the circuit splits identified in the petition. The plaintiff in *Brzonkala* alleged *inter alia* that two fellow students gang raped her in September of 1994, and that the university failed to impose meaningful punishment on

either of the assailants, despite finding one of them guilty. The Fourth Circuit reversed the district court's ruling that the plaintiff had failed to state a claim for a hostile environment under Title IX, holding that (1) Title IX requires a school to take prompt and adequate remedial action in response to student-to-student sexual harassment of which the school knew or should have known; and (2) Title VII principles apply to determine a school's liability for a hostile environment sexual harassment claim under Title IX.

2. The Fourth Circuit has now aligned itself with the Ninth Circuit in recognizing peer hostile environment sexual harassment as a violation of Title IX. Respondents erroneously claim that *Oona, R.S. v. McCaffrey*, 122 F.3d 1207 (9th Cir. 1997), did not reach student-to-student harassment. In *Oona*, the court found that the obligation to remedy teacher-to-student and peer sexual harassment was clearly established at the time of the alleged injury. *Id.* at 1210-11. Building on its earlier decision in *Doe v. Petaluma School District*, 54 F.3d 1447 (9th Cir. 1995), in which it stated that this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), established a duty on the part of school officials to respond to student-to-student sexual harassment, the court in *Oona* specifically stated:

We do not consider what steps school officials may reasonably be required to take to prevent harassment by fellow students, and hence do not consider the extent to which such action may differ from the action reasonably expected of employers to prevent harassment by fellow employees. *We hold only that the duty to take reasonable steps is clearly established.*

*Oona*, 122 F.3d at 1211 (emphasis added).

Notwithstanding Respondents' assertions, the fact that *Oona* focused on whether individual school officials were entitled to qualified immunity under 42 U.S.C. § 1983 in

no way undermines the court's holding that Title IX requires schools to take prompt and appropriate action to address student-to-student sexual harassment. Section 1983 merely provided a basis for holding the individuals liable for violating Title IX. In order to determine whether the individual defendants could be held liable, the court had to decide, as a legal matter, whether at the time of the alleged offenses, reasonable school officials should have known that the alleged conduct violated the plaintiff's rights under Title IX. The court concluded that after *Franklin*, school officials had a duty to remedy peer and teacher-student sexual harassment. *Id.* at 1209-11.

3. *Brzonkala* also intensifies the split over whether Title VII principles should guide courts in determining school liability for hostile environment claims under Title IX. The Fourth Circuit looked "to the extensive jurisprudence developed in the Title VII context" to "determin[e] whether an educational institution's handling of a known sexually hostile environment is actionable 'discrimination' under Title IX." *Brzonkala*, 1997 U.S. App. LEXIS 35970, at \*18. The court held that a plaintiff asserting a hostile environment claim under Title IX must show: "1) that she [or he] belongs to a protected group; 2) that she [or he] was subject to unwelcome sexual harassment; 3) that the harassment was based on sex; 4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her [or his] education and create an abusive educational environment; and 5) that some basis for institutional liability has been established." *Id.* at \*24-\*25 (internal quotation marks omitted).

In holding that Title VII principles should guide its determination of a Title IX hostile environment sexual harassment claim, the Fourth Circuit joins the First, Second, Sixth, Eighth, and Ninth Circuits on this issue and aligns itself firmly against the Fifth, Seventh, and Eleventh Circuits.<sup>1</sup> The *Brzonkala* court noted that the

<sup>1</sup> The court relied on the same cases as does Petitioner to support the application of Title VII principles to the Title IX hostile envi-



Eleventh Circuit in this case followed *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir. 1996), while the Ninth Circuit “flatly rejected the *Rowinsky* rationale.” *Id.* at \*22 n.6 (citing *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (en banc), and *Oona*, 122 F.3d at 1210).<sup>2</sup>

4. Respondents assert erroneously that the Eleventh Circuit never reached the merits of the issue of whether Title VII principles should apply to claims of student-to-student sexual harassment brought under Title IX. *Opp’n* at 4. However, the *Davis* en banc court specifically stated that Title VII principles did not apply to the Title IX case before it. The court stated:

We decline appellant’s invitation to use Title VII standards of liability to resolve this Title IX case. First, Title VII and Title IX are worded differently.

. . .

ronment claim. See *Brzonkala*, 1997 U.S. App. LEXIS 35970, at \*18-\*19, \*21-\*22 (citing *Franklin*, 503 U.S. at 75; *Oona*, 122 F.3d at 1210; *Doe v. Claiborne County*, 103 F.3d 495, 515 (6th Cir. 1996); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467-68 (8th Cir. 1996); *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1996); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248-51 (2d Cir. 1995); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988)).

<sup>2</sup> Contrary to Respondents’ assertion, the decision below is even broader than that in *Rowinsky*. *Opp’n* at 5-6. The *Rowinsky* court held that a school *may* be liable for student-to-student sexual harassment under Title IX, but only where the school itself discriminates against the student by responding differently to sexual harassment complaints based on the gender of the complainant. 80 F.3d at 1016. In contrast, the Eleventh Circuit’s holding forecloses even this avenue for liability. Specifically, the court held that schools are not liable under Title IX for peer sexual harassment because they did not receive notice that they could be held liable for this form of sex discrimination. *Davis*, 120 F.3d at 1401. As the dissent noted, this holding insulates federally funded educational institutions from liability for peer harassment in *all* cases, “no matter how egregious—or even criminal—the harassing discriminatory conduct may be, and no matter how cognizant of it supervisors may become.” *Id.* at 1412 (Barkett, Hatchett, Kravitch and Henderson, JJ., dissenting).

Second, Title VII was enacted under the far-reaching Commerce Clause and § 5 of the Fourteenth Amendment. Title IX was not, and consequently its reach is narrower.

Third, the exposition of liability under Title VII depends upon agency principles. Agency principles are useless in discussing liability for student-student harassment under Title IX, because students are not agents of the school board. . . . In short, Title VII jurisprudence does not control the outcome of this case.

*Id.* at 1400 n.13 (citations omitted).

5. Respondents misconstrue other circuit-court decisions applying Title VII standards to Title IX claims. In *Murray v. New York University College of Dentistry*, 57 F.3d 243 (2d Cir. 1995), the court explicitly held that “in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII.” *Id.* at 249. The court then discussed the constructive notice standard for employer liability applicable in situations of harassment by a co-worker or low-level supervisor who does not rely on his authority to harass, and it cited cases regarding whether this standard should be extended in Title VII cases to situations of harassment by non-employees. Ultimately, the court found it “unnecessary to decide . . . to what extent we would apply a constructive-notice standard in cases under either Title VII or Title IX” because *Murray*’s complaint failed to allege any type of notice. *Id.* at 250 (emphasis added). The Second Circuit confirmed its holding in *Murray* recently in *Kracunas v. Iona College*, 119 F.3d 80, 86 (2d Cir. 1997), in which the court held that application of Title VII standards to a Title IX hostile environment sexual harassment claim was appropriate.

Respondents also misapprehend the First Circuit’s holdings on this issue, characterizing *Lipsett v. University of*

*Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), as being strictly limited to the employment context. While *Lipsett* involved a mixed education-employment setting, the First Circuit has since made clear that its holding applies to the education setting as well. In *Brown v. Hot, Sexy, and Safer Products, Inc.*, the First Circuit applied Title VII principles to a Title IX claim alleging a hostile educational environment, citing *Lipsett* for support.<sup>3</sup> 68 F.3d at 539-41.

#### CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARCIA D. GREENBERGER  
VERNA L. WILLIAMS \*  
DEBORAH L. BRAKE  
NEENA K. CHAUDHRY  
NATIONAL WOMEN'S LAW CENTER  
11 Dupont Circle, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 588-5180  
*Attorneys for Petitioner*

January 6, 1998

\* Counsel of Record

---

<sup>3</sup> Respondents' argument that the action in *Lipsett* was limited to declaratory and injunctive relief is misleading, as *Lipsett* was decided before this Court's decision in *Franklin*. Opp'n at 9 (citing *Lipsett*, 864 F.2d at 884 n.3). Thus, the referenced statement in *Lipsett* is no longer good law. See *Franklin*, 503 U.S. at 73-76.



FILED

DEC 18 1997

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

AURELIA DAVIS, as next friend of LASHONDA D.,

*Petitioner,*

—v.—

MONROE COUNTY BOARD OF EDUCATION, *et al.*,*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**BRIEF OF AMICI CURIAE  
NOW LEGAL DEFENSE AND EDUCATION FUND ET AL.  
(ADDITIONAL AMICI LISTED ON INSIDE COVER)  
IN SUPPORT OF PETITIONER**

MARTHA F. DAVIS\*

*\*Counsel of Record*

JULIE GOLDSCHIED

YOLANDA S. WU

NOW LEGAL DEFENSE AND

EDUCATION FUND

99 Hudson Street

New York, New York 10013-2815

(212) 925-6635

FREDERICK B. WARDER, III

REBECCA NOONAN

PATTERSON, BELKNAP, WEBB

&amp; TYLER

1133 Avenue of the Americas

New York, New York 10036-6710

(212) 336-2000

*Attorneys for Amici Curiae*

December 19, 1997

360 pgs

**LIST OF ADDITIONAL AMICI**

**AMERICAN ASSOCIATION OF UNIVERSITY WOMEN  
AMERICAN JEWISH CONGRESS  
CALIFORNIA WOMEN'S LAW CENTER  
CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC.  
EMPLOYMENT LAW CENTER  
EQUAL RIGHTS ADVOCATES  
NATIONAL CENTER FOR LESBIAN RIGHTS  
NORTHWEST WOMEN'S LAW CENTER  
TEXAS CIVIL RIGHTS PROJECT  
TITLE IX ADVOCACY PROJECT  
WOMEN'S LEGAL DEFENSE FUND**



# TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICI CURIAE .....	1
REASONS FOR GRANTING THE PETITION .....	1
ARGUMENT .....	2
I. The Decision Below Exposes Women And Girls Nationwide to Significant Discriminatory Harm .....	2
II. The Decision Below Exacerbates Sexual Harassment And Its Attendant Harms By Permitting Schools To Ignore Peer Sexual Harassment Complaints .....	6
A. Schools Can and Should Take Many Steps To Reduce Sexual Harassment And Its Accompanying Harm .....	7
B. The Decision Below Is Based On A Flawed Analysis Of The Range Of Schools' Responses To Peer Sexual Harassment Complaints .....	11
III. The Decision Below Would Eviscerate Federal Anti- discrimination Law's Prohibition of Discrimination In Schools. ....	13
CONCLUSION .....	17

## TABLE OF AUTHORITIES

## Page

## CASES

<u>Acosta v. Los Angeles Unified Sch. Dist.</u> , 31 Cal. App. 4th 471 (1995) . . . . .	15
<u>Barnes v. Castle</u> , 561 F.2d 983 (D.C. Cir. 1977). . . . .	15
<u>Bator v. Hawaii</u> , 39 F.3d 1021 (9th Cir. 1994) . . . . .	15
<u>Bohen v. City of East Chicago</u> , 799 F.2d 1180 (7th Cir. 1986) . . . . .	15
<u>Bosley v. Kearney R-1 Sch. Dist.</u> , 904 F. Supp. 1006 (W.D. Mo 1995) . . . . .	7
<u>Bruneau v. South Kortright Cent. Sch. Dist.</u> , 935 F. Supp. 162 (N.D.N.Y. 1996) . . . . .	5
<u>Carrero v. New York City Housing Auth.</u> , 890 F.2d 569 (2d Cir.1989) . . . . .	15
<u>Clyde K. v. Puyallup Sch. Dist. No.3</u> , 35 F.3d 1396 (9th Cir. 1944) . . . . .	7
<u>Dailey v. Los Angeles Unified Sch. Dist.</u> , 2 Cal. 3d 741 (1970) . . . . .	15
<u>Davis v. Monroe County Bd. of Educ.</u> , 120 F.3d 1390 (11th Cir. 1997) (en banc) . . . . .	passim

<u>Doe v. Lago Vista</u> , 106 F. 3d 1223 (5th Cir. 1997), cert. granted, 1997 U.S. LEXIS 7337 (Dec. 5, 1997) . . . . .	2
<u>Faragher v. City of Boca Raton</u> , 111 F.3d 1530 (11th Cir. 1997) (en banc) cert. granted, 1997 U.S. LEXIS 7042 (Nov. 14, 1997) . . . . .	2
<u>Franklin v. Gwinnett County Pub. Schs.</u> , 503 U.S. 60 (1992) . . . . .	2,3,14
<u>Harris v. Forklift Sys.</u> , 510 U.S. 17 (1993) . . . . .	2
<u>Hirschfeld v. New Mexico Corrections Dep't.</u> , 916 F.2d 572 (10th Cir. 1990) . . . . .	13
<u>Jansen v. Packaging Corp. of America</u> , 123 F.3d 490 (7th Cir. 1997) . . . . .	6
<u>Lindsey v. Shalmy</u> , 29 F.3d 1382 (9th Cir. 1994) . . . . .	15
<u>Meritor Savings Bank, FSB v. Vinson</u> , 477 U.S. 57 (1986) . . . . .	2-3,5,6
<u>Monroe v. Pape</u> , 365 U.S. 167 (1961), overruled in part on other grounds by <u>Monell v. Dep't of Social Servs.</u> , 436 U.S. 658 (1978) . . . . .	15
<u>Nicole M. V. Martinez Unified Sch. Dist.</u> , 964 F. Supp. 1369 (N. D. Cal. 1997) . . . . .	13



<u>North Haven Bd. of Educ. v. Bell</u> , 456 U.S. 512 (1982) . . . . .	3
<u>Oona v. Santa Rosa City Schs.</u> , 890 F.Supp. 1452 (N.D. Cal. 1995), aff'd, 122 F.3d 1207 (9th Cir. 1997) . . . . .	8
<u>Owen v. City of Independence</u> , 445 U.S. 622 (1980) . . . . .	11,15
<u>Patricia H. v. Berkeley Unified Sch.</u> Dist., 830 F.Supp. 1288 (N.D. Cal. 1993) . . . . .	8
<u>United States v. Jefferson County Bd. of</u> <u>Educ.</u> , 380 F.2d 385 (5th Cir) (en banc), cert. denied sub nom, 389 U.S. 840 (1967) . . . . .	15

## FEDERAL STATUTES AND REGULATIONS

Age Discrimination in Employment Act, 29 U.S.C. § 621 . . . . .	16
Americans With Disabilities Act, 42 U.S.C. § 12101 . . . . .	16
Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 . . . . .	15
Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. . . . .	14-15,16

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e . . . . .	16
Title IX of the Educational Amendments of 1972 20 U.S.C. §§ 1681 et seq. . . . .	passim
34 C.F.R. §§ 106.1-106.71 (1992) . . . . .	3
34 C.F.R. § 106.8(b) (1997) . . . . .	9

## STATE STATUTES

Cal. Ed. Code § 212.6 (1996) . . . . .	9
Cal. Ed. Code § 48900.2 (1996) . . . . .	12
Fla. Stat. § 230.23(6)(d) (1996) . . . . .	10
Michigan MSA § 15.41300(1) (1996) . . . . .	10
Michigan MCL § 380.1300a (1996) . . . . .	10
Minn. Stat. § 127.455 (1996) . . . . .	10
Minn. Stat. § 127.46 (1996) . . . . .	12
Rev. Code. Wash. (ARCW) § 28A.640.020 (1996) . . . . .	10
Texas Educ. Code § 37.083 (1997) . . . . .	10
Vermont 16 U.S.A. § 11(a)(26) (1996) . . . . .	10

## OTHER AUTHORITIES

- AAUW Educational Foundation, Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools (1993) . . . . . 4,5,16
- Judith I. Avner, Sexual Harassment: Building a Consensus for Change, Kan.J.L. & Pub. Pol'y 57 (Spr. 1994) . . . . . 11
- Carrie N. Baker, Proposed Title IX Guidelines on Sex-Based Harassment of Students, 43 Emory L.J. 271 (1994) . . . . . 11
- Kathleen Beauvais, Workshops to Combat Sexual Harassment: A Case Study of Changing Attitudes, 12 Signs 130 (1986) . . . . . 9
- Crackdown on Sexual Harassment, 6 CQ Researcher 625 (July 19, 1996) . . . . . 10
- Department of Education's Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, 62 Fed. Reg. 12,034 1997 . . . . . 3,9,12,14
- Helena K. Dolan, The Fourth R--Respect: Combating Peer Sexual Harassment in the Public Schools, 63 Fordham L.Rev. 215 (1992) . . . . . 8
- Jollee Faber, Expanding Title IX of the Education Amendments of 1972 To Prohibit Student to Student Sexual Harassment, 2 UCLA Womens L.J. 85 (1992) . . . . . 11

- Nan M. Higginson, Addressing Sexual Harassment in The Classroom, Educ. Leadership, Nov. 1993, at 93 . . . 9
- Valerie Lee, et al., The Culture of Sexual Harassment in Secondary Schools, 33 A. Educ. Res. J. 383 (1996) . . . 3
- Panelists Say Education is Essential to Effective Harassment Prevention Policy, 66 U.S.L.W. 2271 (Nov. 4, 1997) . . . . . 11
- Permanent Comm'n on the Status of Woman, In Our Own Back Yard: Sexual Harassment in Connecticut's Public High Schools (Jan. 1995) . . . 3,4,6
- Stephanie H. Roth, Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education, 23 J.L. & Educ. 459 (1994) . . . . . 7
- Bernice R. Sandler, The Chilly Classroom Climate: A Guide to Improve the Education of Women, (Nat'l Ass'n for Women in Educ. 1996) . . . . . 4-5
- Bernice R. Sandler & Robert G. Shoop, Sexual Harassment on Campus: A Guide for Administrators, Faculty and Students (1997) . . . 4,5,8,12
- Robert Shoop & Debra L. Edwards, How to Stop Sexual Harassment in Our Schools: A Handbook and Curriculum Guide (1994) . . . . . 9
- Douglas D. Smith, The Efficacy of a Selected Training Program on Changing Perceptions of Sexual Harassment (1993) (unpublished Ph.D. dissertation, University of Northern Colorado) (on file at NOW LDEF) . . . . . 9



Nan Stein, et al., <u>Secrets in Public: Sexual Harassment in Our Schools</u> (1993) . . . . .	3-4
JoAnn Strauss, Peter <u>Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions</u> , 10 Law & Ineq. J. 163 (1992) . . . . .	7,11
Texas Civil Rights Project, <u>Peer Sexual Harassment: A Texas Size Problem</u> (Oct. 1997) . . . . .	3,4,5
U.S. Merit Systems Protection Board, <u>Sexual Harassment in the Federal Workplace</u> , (1995) . . . . .	16
Ellen J. Wagner, <u>Sexual Harassment in the Workplace</u> , 110 (1983) . . . . .	11
Elizabeth A. Williams, et al., <u>Impact of a University Policy on the Sexual Harassment of Female Students</u> , 63 J. Higher Educ. 50 (1992) . . . . .	8

## INTEREST OF AMICI CURIAE

Amici curiae are organizations strongly committed to achieving equality for women, each with an abiding interest in ensuring the sound interpretation and application of the provisions contained in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-1688 ("Title IX") that protect students against sexual harassment in schools. Descriptions of the individual organizations are set forth in the attached Addendum.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court.<sup>1</sup>

## REASONS FOR GRANTING THE PETITION

Sexual harassment in schools poses an issue of grave national importance because it threatens the development and education of school children throughout our country. Peer sexual harassment, the most common form of sexual harassment in schools, causes the same discriminatory harm as other types of sexual harassment that this Court already has recognized are redressed by our country's anti-discrimination laws. Yet the decision below carves peer sexual harassment out of the range of discriminatory conduct prohibited by Title IX. See *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*). Sociological and anecdotal evidence confirm both the harmful effects of peer sexual harassment and schools' abilities to mitigate the problem. The Eleventh Circuit

---

<sup>1</sup> This brief was authored by the amici and counsel listed on the front cover of this brief, and was not authored in whole or in part by counsel for a party. No one other than the amici and their counsel made any monetary contribution to the preparation or submission of this brief.

majority authorizes school officials to stand by and do nothing in the face of hostile environment sexual harassment in their schools when the hostile environment is created by students. This Court's review is needed to reverse that erroneous decision, which misinterprets an important question of federal law, conflicts with this Court's prior holdings, and jeopardizes the equal educational rights of all students nationwide.<sup>2</sup>

## ARGUMENT

### I. The Decision Below Exposes Women And Girls Nationwide to Significant Discriminatory Harm

Each time it has addressed the issue, this Court unanimously has recognized that sexual harassment produces serious, discriminatory harm, and that institutions such as workplaces and schools must take reasonable steps to eliminate or reduce its occurrence. See *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992); *Meritor Savings Bank,*

---

<sup>2</sup> Resolution of the two sexual harassment cases in which this Court recently granted petitions for certiorari, *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (en banc), cert. granted, 1997 U.S. LEXIS 7042 (Nov. 14, 1997), and *Doe v. Lago Vista*, 106 F.3d 1223 (5th Cir. 1997), cert. granted, 1997 U.S. LEXIS 7337 (Dec. 5, 1997), still leaves unresolved the question whether Title IX provides redress for peer sexual harassment, the central question presented by this petition. The vicarious liability standard for sexual harassment by supervisors or teachers, respectively, which is at issue in those cases, is different from the standard for liability in peer sexual harassment cases, under which schools would be held liable when they knew or should have known of peer sexual harassment and failed to take prompt and effective immediate action to remedy it.

*FSB v. Vinson*, 477 U.S. 57, 66 (1986).<sup>3</sup> Title IX mandates the elimination of all types of sex discrimination, which includes sexual harassment, whether committed by teachers, as was the case in *Franklin*, or by students, as is the case in *Davis*. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (directing courts to accord Title IX "a sweep as broad as its language").

In both the workplace and in schools, sexual harassment has dramatic consequences of national significance. Several recent empirical studies of student populations confirm both the presence and harmful impact of sexual harassment in schools, whether it is committed by teachers or by students. See Texas Civil Rights Project, *Peer Sexual Harassment: A Texas-Size Problem* at 13 (Oct. 1997) (hereinafter *Texas Survey*) (76% of girls reported experiencing some form of sexual harassment in school); Valerie Lee et al., *The Culture of Sexual Harassment in Secondary Schools*, 33 A. Educ. Res. J. 383, 397 (1996) (hereinafter *Secondary Schools*) (83% of the girls reported having been sexually harassed); Permanent Comm'n on the Status of Women, *In Our Own Back Yard: Sexual Harassment in Connecticut's Public High Schools* at 10 (Jan. 1995) (hereinafter *Our Own Backyard*) (92% of girls reported at least one type of unwanted sexual behavior); Nan Stein et al., *Secrets in*

---

<sup>3</sup> Consistent with this Court's previous sexual harassment rulings but contrary to the *Davis* opinion, the Department of Education's Office for Civil Rights ("OCR") also recognizes schools' obligations under Title IX to take immediate and appropriate steps to remedy known peer sexual harassment. See Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties*, 62 Fed. Reg. 12,034, 12,039 (1997) ("OCR Guidance"). As the administrative agency charged with enforcing Title IX, see 34 C.F.R. §§ 106.1-106.71 (1992), this Court normally defers to OCR's interpretation of Title IX. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1982).



Public: Sexual Harassment in Our Schools at 2 (1993) (hereinafter Secrets in Public) (83% of the girls were touched, pinched or grabbed; and 39% reported some form of sexual harassment on a daily basis in the last year); AAUW Educational Foundation, Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools at 7-8 (1993) (hereinafter Hostile Hallways) (85% of the girls reported experiencing some form of unwanted and unwelcome sexual behavior; of those girls, 65% were touched, grabbed, or pinched in a sexual way; and 66% reported experiencing at least one form of harassment occasionally"); see also Bernice R. Sandler & Robert J. Shoop, Sexual Harassment on Campus: A Guide for Administrators, Faculty, and Students, (1997) (referencing studies conducted of sexual harassment in post-secondary education) (hereinafter Sexual Harassment on Campus).

Peer sexual harassment is the most common form of harassment students experience. See Texas Survey at 19 (89% of most serious harassment was committed by other students); Sexual Harassment on Campus at 13 (between 70 and 90% of undergraduate women reported at least one incident of serious sexual harassment by a male student); Our Own Backyard at 23 (76% of the harassment was committed by other students); Hostile Hallways (79% of students reported sexual harassment by other students); Secrets in Public at 6 (96% of students reported sexual harassment by other students).

Whether caused by teachers or by other students, sexual harassment causes real and demonstrable harm to students' educational and social development. Sexually hostile environments reduce female students' class participation and cause girls to drop out of classes entirely. See Bernice R. Sandler, The Chilly Classroom Climate: A Guide to Improve

the Education of Women, 15-17, 19 (Nat'l Ass'n for Women in Educ. 1996); see also Hostile Hallways at 15-16 (33% of the girls who suffered sexual harassment reported not wanting to attend school; 32% reported not wanting to talk as much in class; 28% found it harder to pay attention in school; and 18% reported thinking about changing schools); Sexual Harassment on Campus at 57 (reporting that peer sexual harassment may cause female college students to drop classes, change majors or schools, or drop out of college). Like sexually harassed employees, sexually harassed students choose to withdraw from educational activities rather than "run the gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education." Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 171 (N.D.N.Y. 1996); cf. Meritor, 477 U.S. at 67 (recognizing that Title VII protects employees from having to run a gauntlet of sexual abuse at work).<sup>4</sup>

School officials are in a unique position to intervene. Most episodes of harassment do not occur in private or secluded places, but happen in classrooms and other areas where teachers, administrators and other school employees patrol and control student conduct. See Texas Survey at 19, 21 (63% of girls reported that the most serious incidents of harassment occurred in the classroom; 68% of girls reported that a teacher or school administrator was present during the most serious incident of harassment); Hostile Hallways at 24 (55% of those who had been harassed identified the classroom as the location of the incident; 66% of students

---

<sup>4</sup> The facts of this case exemplify the harms documented in the studies and recognized by courts. The complained-of harassment caused LaShonda Davis such mental anguish that her grades dropped over the period of harassment; it lead her to write a suicide note before finally leaving the school. *Id.* at 1394.

who had been harassed reported being harassed in the school hallway); Our Own Backyards at 15 (44% of students reported incidents of sexual harassment in the classroom; 62% reported incidents in the hallway). Despite the evidence that school officials often are well-positioned to address this issue, the Davis decision allows them to ignore peer sexual harassment, permitting sexually hostile educational environments to thrive, at great cost to our country's children. This Court's review is needed to ensure that school officials take action to fulfill Title IX's mandate to eliminate all sex discrimination in schools.

## **II. The Decision Below Exacerbates Sexual Harassment And Its Attendant Harms By Permitting Schools To Ignore Peer Sexual Harassment Complaints**

By misconstruing the range of responses available to schools and by eviscerating schools' Title IX obligations to take any preventive or remedial actions to address peer sexual harassment, the Davis majority leaves schools without any incentive to address the problem. Such a response defies this Court's emphasis on sexual harassment policies and grievance procedures as a means to prevent such discrimination and exacerbates, rather than reduces, the harm targeted by Titles VII and IX. See *Meritor*, 477 U.S. at 72-73; accord *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 495 (7th Cir. 1997) (Flaum, J. writing for plurality) (recognizing that deterrence, achieved through implementing sexual harassment policies, should be the primary goal in addressing sexual harassment).

## **A. Schools Can and Should Take Many Steps To Reduce Sexual Harassment And Its Accompanying Harm.**

The Davis decision raises an issue of grave national importance because it allows schools to ignore peer sexual harassment complaints rather than take any of the steps, including implementing sexual harassment policies and procedures, that have been proven to help reduce the problem. By permitting a school to ignore a complaint of peer sexual harassment, the Davis decision endorses policies that exacerbate the educational and emotional harm suffered by students who are sexually harassed. See Stephanie H. Roth, Sex Discrimination 101: Developing a Title IX Analysis for Sexual Harassment in Education, 23 J.L. & Educ. 459, 466-69 (1994); JoAnn Strauss, Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions, 10 Law & Ineq. J. 163, 176-77 (1992) (describing state agency finding that school's failure to take immediate action in response to student sexual harassment contributes to hostile environment).

Yet many courts have recognized schools' crucial role in reducing the destructive effects of peer sexual harassment. As one court reasoned in a case involving sexual harassment between students: "[g]iven the extremely harmful effects sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools." *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1020 (W.D. Mo. 1995) (citing *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1401-02 (9th Cir. 1994)). Courts correctly have been driven by the understanding that "[t]he distinctions between the school environment and the



workplace serve only to emphasize the need for zealous protection against sex discrimination in the schools." Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1293 (N.D. Cal. 1993)); accord Oona v. Santa Rosa City Schs., 890 F. Supp. 1452, 1467 (N.D. Cal. 1995), *aff'd*, 122 F.3d 1207 (9th Cir. 1997).

The specter of liability could provide an incentive for schools to intervene in response to sexual harassment complaints. Studies repeatedly have shown that adopting and implementing policies, procedures and training programs dramatically can improve schools' responses when problems arise and can reduce the incidence of sexual harassment. See Elizabeth A. Williams, et al., Impact of University Policy on the Sexual Harassment of Female Students, 63 J. Higher Educ. 50, 57, 59, 62-63 (1992) (finding that continued and intensive sexual harassment education increased awareness and reduced sexual harassment in schools); Sexual Harassment on Campus at 55 (reporting higher incidence of peer sexual harassment on college campuses that failed to adopt or enforce a sexual harassment policy and fail to respond to sexual harassment complaints). Appropriate training for teachers and other school personnel enables them to address and respond effectively to peer sexual harassment complaints. Cf. Helen K. Dolan, The Fourth R- Respect: Combating Peer Sexual Harassment in the Public Schools, 63 Fordham L. Rev. 215, 243 (1992) (citing student reports that schools' lack of policies deter reporting).

Reasoned, preventative measures and responses have been shown to reduce sexual harassment. Two separate studies of undergraduate students document that male students who participate in sexual harassment training programs become more aware of what constitutes sexual

harassment. See Douglas D. Smith, The Efficacy of a Selected Training Program in Changing Perceptions of Sexual Harassment (1993) (unpublished Ph.D. dissertation, University of Northern Colorado) (on file at NOW LDEF); Kathleen Beauvais, Workshops to Combat Sexual Harassment: A Case Study of Changing Attitudes, 12 Signs 130, 130-45 (1996); see also Nan M. Higgenson, Addressing Sexual Harassment in the Classroom, 53 Educ. Leadership 93-96 (1993); Robert Shoop & Debra L. Edwards, How to Stop Sexual Harassment in Our Schools: A Handbook and Curriculum Guide, 142-48 (1994) (training programs in Minnesota and Nebraska increased awareness and reduced sexual harassment in schools).

Consistent with those studies, the OCR has construed Title IX to require schools to adopt and publish grievance procedures in order to discover and remedy sexual harassment as early as possible. OCR Guidance at 12,044-45; see also 34 C.F.R. § 106.8(b) (1997) (requiring schools receiving federal funds to adopt and publish grievance procedures for prompt and equitable resolution of complaints that the school violated Title IX). The OCR encourages students to bring problems to the school's attention before a hostile environment develops and recommends training administrators, teachers, and staff about sexual harassment. OCR Guidance, at 12,044-45. State education codes similarly encourage schools to adopt sexual harassment policies. California, Florida, Michigan, Minnesota, Texas, Vermont, and Washington all require school districts, or a similar local governing body, to formulate and implement sexual harassment policies.<sup>5</sup> At least two states specify that

---

<sup>5</sup> See Cal. Ed. Code § 212.6 (1996) (requiring all educational institutions to have, publish, and display written policy on sexual harassment that includes information on obtaining rules and procedures for reporting

schools' policies should cover peer sexual harassment.<sup>6</sup>

Empirical studies of research on workplace sexual harassment confirm that comprehensive policies and training programs effectively curb sexual harassment. Companies that have implemented sexual harassment training programs have been less likely to see claims develop into lawsuits. See Crackdown on Sexual Harassment, 6 CQ Researcher 625, 633-34 (July 19, 1996) (in survey of 456 mid-size and large companies, 8% of companies with sexual harassment training programs were sued, as opposed to 12% of those without such programs). Commentators similarly have concluded that a prevention program, including well-communicated policies and effective training programs, is the single most important solution to reducing sexual

---

charges of sexual harassment and for pursuing available remedies); Fla. Stat. § 230.23 (6)(d) (1996) (requiring that each school district adopt code of student conduct which must state that violation of the school board's sexual harassment policy may be grounds for suspension, expulsion, imposition of disciplinary action, or imposition of criminal penalties); Minn Stat. § 127.455 (1996) (requiring that Commissioner of Children, Families, and Learning make available to school boards model sexual harassment policy, and that each school board submit to the Commissioner the sexual harassment policy it has adopted); Texas Educ. Code § 37.083 (1997) (requiring that each school district adopt and implement sexual harassment plan); 16 V.S.A. § 565 (1996) (requiring that each school district adopt and make available policy that prohibits harassment of students, and provides appropriate remedial action for staff and students who commit harassment).

<sup>6</sup> See MSA § 15.41300(1) (1996), MCL § 380.1300 a (requiring that each school district adopt and implement sexual harassment policy prohibiting sexual harassment by school district employees and pupils directed toward other employees or pupils); Rev. Code. Wash. (ARCW) § 28A.640.020 (1996) (requiring that every school district adopt, implement, and post written policy regarding sexual harassment that applies to all school district employees, volunteers, parents, and students and that includes conduct between students).

harassment at work. See Judith I. Avner, Sexual Harassment: Building a Consensus for Change, Kan. J.L. & Pub Pol'y 57, 74 (Spr. 1994); Ellen J. Wagner, Sexual Harassment in the Workplace, 110, 119 (1983); see also Panelists Say Education is Essential to Effective Harassment Prevention Policy, 66 U.S.L.W. 2271 (Nov. 4, 1997).

Holding schools liable for failing to address peer sexual harassment and for their failure to adopt, publish and implement a Title IX policy provides a compelling incentive for schools to take these critical steps. See Strauss, *supra*, at 178, Carrie N. Baker, Proposed Title IX Guidelines on Sex-Based Harassment of Students, 43 Emory L.J. 271, 307 (1994); Jollee Faber, Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment, 2 UCLA Women's L.J. 85, 91 (1992); cf. Owen v. City of Independence, 445 U.S. 622, 652 n. 35 (1980) (recognizing the threat of liability as a powerful incentive for spurring employers to refrain from violating employees' constitutional rights). By eliminating peer sexual harassment from the range of discrimination prohibited by Title IX, the Davis majority defies all of this guidance and instead encourages school officials to bury their heads in the sand.

#### **B. The Decision Below Is Based On A Flawed Analysis Of The Range Of Schools' Responses To Peer Sexual Harassment Complaints**

In rejecting wholesale Title IX's applicability to peer sexual harassment cases, the Davis court ignores our national policy and expectation that school officials monitor and shape students' behavior. The Davis court casts aside schools' duties to stop peer sexual harassment because students are not agents of the school, ignoring the reality of



interactions between school officials and students. See *Davis*, 120 F.3d at 1399-1400 n. 13; see also *id.* at 1401 (Tjoflat, J.) (presuming that schools would either have to expel or suspend accused harassers immediately if schools were held accountable for peer sexual harassment).<sup>7</sup> That conclusion conflicts with the OCR's mandates and the wisdom of courts, state legislatures, and the empirical data, each of which recognizes the wide range of responsive measures school officials can and should invoke to respond to and reduce peer sexual harassment.

Contrary to the Eleventh Circuit's constrained view, school officials' responses to sexual harassment, like their responses to other forms of discrimination and student misconduct, can range from counseling and warnings, to education and training, to severe discipline such as suspension or expulsion when other efforts prove ineffective. See OCR Guidance at 12,043 (recognizing the range of appropriate responses to complaints of peer sexual harassment, including counseling, warning, incremental disciplinary action); cf. Cal Ed. Code § 48900.2 (1996) (enumerating differential disciplinary responses to sexual harassment complaints depending on the facts of the allegation); Minn. Stat. § 127.46 (1996) (same); see also *Sexual Harassment on Campus* at 59-61 (documenting range of possible responses to peer sexual harassment). A school's response to any specific complaint will vary according to each situation. See, e.g., OCR Guidance at 12,042 ("[w]hat constitutes a reasonable response to information about possible sexual harassment will differ depending upon the circumstances").

---

<sup>7</sup> This portion of Judge Tjoflat's majority opinion was not joined by any other members of the court. See *id.* at 1407 n.1 (Carnes, J., special concurrence).

Indeed, courts have recognized the range of responses schools can employ in peer sexual harassment cases. See, e.g., *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1386 (N.D. Cal. 1997) (discussing steps reasonably calculated to end the harassment in relation to its frequency and severity); see also *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 578-79 n.7 (10th Cir. 1990) (recognizing the range of responses available to an employer once it is on notice of a sexually hostile work environment).

Consistent with that guidance but contrary to Judge Tjoflat's suggestion, the Monroe County Board of Education and the Hubbard school had available a range of responses to Ms. Davis' complaints. They were not limited to the extremes of either completely failing to respond or immediate suspension or expulsion, as feared by Judge Tjoflat. See *Davis*, 120 F.3d at 1401 (Tjoflat, J.). School officials could have investigated the complaint, permitted Ms. Davis to change her seat so that she did not have to sit next to the alleged harasser for three months, or imposed progressive discipline. See *id.* at 1393. The decision below erroneously limits school officials' traditional and routine roles and eliminates their responsibilities for remedying hostile environment sexual harassment, permitting schools to violate Title IX.

### **III. The Decision Below Would Eviscerate Federal Anti-discrimination Law's Prohibition of Discrimination In Schools.**

This Court's review also is needed to address faulty public policy presumptions about the liability that would result from holding schools responsible for peer sexual harassment. The opinion of one judge raises the specter of

"whipsaw" and "sky-rocketing" liability as a justification for exempting schools from any obligation to respond to peer sexual harassment complaints. *Davis*, 120 F.3d at 1401 (Tjoflat, J.). That reasoning violates the fundamental premise of federal anti-discrimination laws, which courts successfully have enforced in many contexts without infringing on due process rights or wreaking financial havoc on public institutions.

In rejecting Title IX's coverage of peer sexual harassment, Judge Tjoflat's opinion cited fears that schools would face the untenable predicament of being held liable either by harassers if they take action to address sexual harassment complaints, or by victims if they fail to respond. *Id.* at 1401. Yet, rather than infringing on students' due process rights, a school policy that requires school officials to respond to peer sexual harassment complaints would provide a vehicle for accommodating alleged offenders' due process rights. For example, the OCR Guidance recommends conducting prompt, thorough and impartial investigations, OCR Guidance, at 12,042, and specifically directs schools to protect students' due process rights when implementing sexual harassment policies. *Id.* at 12,045. As the Guidance recognizes, "procedures that ensure the Title IX rights of the complainant while at the same time according due process to both parties involved will lead to sound and supportable decisions." *Id.* at 12,045.

Moreover, school officials routinely fulfill their obligations to enforce anti-discrimination and other laws notwithstanding the specter of liability if they overstep their bounds. For example, schools may be liable for teacher-to-student sexual harassment under Title IX, see *Franklin*, 503 U.S. at 74; are charged with protecting students from race discrimination under Title VI of the Civil Rights Act of

1964, 42 U.S.C. §§ 2000d et seq. ("Title VI"), see *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 389 (5th Cir.) (en banc), cert. denied sub nom, 389 U.S. 840 (1967); and owe students a duty of care under tort law, see *Dailey v. Los Angeles Unified Sch. Dist.*, 2 Cal.3d 741, 747 (1970); *Acosta v. Los Angeles Unified Sch. Dist.*, 31 Cal. App. 4th 471, 477 (1995). No court has permitted schools to ignore those legal obligations based on the possibility that they may be sued for violating due process rights.

As Judge Carnes' concurring opinion notes, Judge Tjoflat's reasoning would eviscerate state officials' obligations to comply with a range of laws in a variety of settings, including jails and prisons. *Davis*, 120 F. 3d at 1409 (Carnes, J., concurring). It would eliminate public institutions' exposure to liability for violating Constitutional or statutory rights as enforced under 42 U.S.C. § 1983. See generally *Owen v. City of Independence*, 445 U.S. 622 (1980); *Monroe v. Pape*, 365 U.S. 167 (1961), overruled in part on other grounds by *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). It defies public agencies' obligations to respond to complaints of sexual harassment at work, in which they must similarly respect the accused's due process rights. See, e.g., *Lindsey v. Shalmy*, 29 F.3d 1382 (9th Cir. 1994); *Bator v. Hawaii*, 39 F.3d 1021 (9th Cir. 1994); *Carrero v. New York City Housing Auth.*, 890 F.2d 569 (2d Cir. 1989); *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

Judge Tjoflat's decision also erroneously predicts a "substantial" amount of litigation if peer sexual harassment is recognized as a violation of Title IX. 120 F.3d at 1405-06. As an initial matter, that discussion incorrectly references the



Hostile Hallways study, which provides a description of the scope and nature of sexual harassment rather than a prediction or analysis of the viability of potential lawsuits.<sup>8</sup> Moreover, the opinion's premise is logically defective. Schools' desires to avoid monetary damages should compel them to comply with well-established statutory and constitutional standards rather than providing a rationale for eliminating anti-discrimination protections. Taking Judge Tjoflat's concern to its logical conclusion, any public institution could cry "financial ruin" to avoid liability for violating civil rights laws. This flies in the face of our national commitment to civil rights laws, which specifically prohibit discrimination and provide a remedy for the harm that results when it goes unchecked.<sup>9</sup> Certainly, the specter of uncovering widespread violations of anti-discrimination laws should provide an incentive for education, prevention and enforcement rather than an excuse to eliminate liability. Judge Tjoflat's opinion, and the majority decision, articulate no principle for distinguishing peer sexual harassment suits from all other civil rights claims. This Court should grant the petition to uphold the viability of our country's anti-discrimination laws and to confirm that schools can best avoid liability by complying with, rather than ignoring Title IX's mandate to eliminate all sex discrimination in our federally-funded schools.

---

<sup>8</sup> In any event, studies of sexual harassment at work show that of women who experience sexual harassment and attempt some form of response, only six percent make formal reports. See U.S. Merit Systems Protection Bd., *Sexual Harassment in the Federal Workplace* at viii (1995).

<sup>9</sup> See, e.g., 42 U.S.C. § 2000e (Title VII) (prohibiting discrimination based on race, color, religion, sex, or national origin); 42 U.S.C. § 2000d (Title VI) (prohibiting discrimination on race, color, or national origin); 29 U.S.C. § 621 (Age Discrimination in Employment Act); 42 U.S.C. § 12101 (Americans with Disabilities Act).

## CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to grant the petition for certiorari to correct the Davis majority's distinction of peer sexual harassment from other forms of sexual harassment and to confirm that Title IX proscribes all forms of sexual harassment in schools, whether committed by teachers or by students.

Respectfully submitted,

Martha F. Davis\*  
Julie Goldscheid  
Yolanda S. Wu  
NOW Legal Defense and  
Education Fund  
99 Hudson Street  
New York, NY 10013  
(212) 925-6635

Frederick B. Warder, III  
Rebecca Noonan  
Patterson, Belknap, Webb &  
Tyler  
1133 Avenue of the Americas  
New York, NY 10036-6710  
(212) 336-2000

*Attorneys for Amici Curiae*

December 19, 1997

\* Counsel of Record

**ADDENDUM**



**Statements of Interest****American Association of University Women**

The American Association of University Women (AAUW) has worked since 1881 to promote equity and education for all women and girls. AAUW's 162,000 members are women and men college graduates committed to ensuring equal educational opportunity for all. Vigorous enforcement of Title IX is a priority issue for AAUW, which has urged its members to take action on the findings of *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools*. Released by the AAUW Educational Foundation in 1993, *Hostile Hallways* documented that sexual harassment is a daily occurrence in public schools and that it has severely negative effects on the education of both female and male students.

**American Jewish Congress**

The American Jewish Congress Commission for Women's Equality is an activist leadership group of Jewish women which seeks to pursue equal rights for women within a Jewish context. As an arm of the American Jewish Congress it has filed numerous briefs in the Supreme Court concerning abortion and reproductive rights and sexual discrimination and harassment. It believes that women, particularly young women in a school setting, cannot reach their full potential if they are sexually harassed by their fellow students. It further believes that Title IX of the Education Amendments of 1972 requires school authorities to protect students against peer harassment.

### California Women's Law Center

The California Women's Law Center (CWLC) is a policy and advocacy organization dedicated to advancing and securing the civil rights of women and girls. The CWLC uses a variety of novel approaches and collaborations to meet the legal needs of women and girls. The CWLC was established in 1989 and addresses the following priority areas and the relationship between those areas: Sex Discrimination, including sex discrimination in education, Reproductive Rights, Family Law, Violence Against Women and Child Care.

### Connecticut Women's Education and Legal Fund, Inc.

The Connecticut Women's Education and Legal Fund, Inc. (CWEALF), is a non-profit women's rights organization. Incorporated in 1973, CWEALF has over 1,400 members. The mission of the organization is to work through legal and public policy strategies and community education to end sex discrimination in the state's education, judicial, social service, and employment systems. For nearly 25 years, CWEALF has been a leader in Connecticut in working on the issue of sexual harassment. We provide legal information and referral to women on a daily basis who face sexual harassment in the workplace; we conduct training on sexual harassment prevention to managers and workers, students and teachers; and we write *amicus curiae* briefs and provide technical assistance to policy makers in order to improve laws dealing with sexual harassment.

### Employment Law Center

The Employment Law Center (ELC), a project of the Legal Aid Society of San Francisco, is a private, non-profit, public interest law firm which represents indigent workers in cases involving employment discrimination and workplace

rights. The ELC specializes in, among other areas of the law, sex discrimination.

The ELC was counsel of record for Katherine Vinson in *Vinson v. Superior Court*, 43 Cal. 3d 833, 239 Cal. Rptr. 292 (1987), in which the California Supreme Court ruled that a mental examination is not warranted in a simple sexual harassment case where the claimant seeks compensation for having to endure an oppressive work environment or for wages lost following an unjust dismissal.

Prior to the *Vinson* case, the ELC was counsel of record in *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983), a sexual harassment case in which the Court denied discovery of detailed information about plaintiff's sexual history, including the name of each person with whom she had sexual relations in the ten years prior to the defendants' discovery request.

The ELC represented Lillian Garland in *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), which upheld California Government Code Section 12945(b)(2), a state law which provides up to four months of pregnancy disability leave and a right to return to the same or similar job.

The ELC also represented Queen Foster in *Johnson Controls, Inc. v. Fair Employment & Housing Commission*, 218 Cal. App.3d 517, 167 Cal. Rptr. 158 (1990), where the California Court of Appeal ruled that the employer's gender-based exclusionary "fetal protection" policy violated the Fair Employment and Housing Act. The ELC also appeared as *amicus curiae* in the United States Supreme Court in *International Union, UAW v. Johnson Controls*, 499 U.S. 187, 111 S. Ct. 1196 (1991), in which the Court held that the employer's "fetal protection" policy constituted sex discrimination prohibited by Title VII of the Civil Rights Act



of 1964.

The ELC has participated as *amicus curiae* in many discrimination cases before the United States Supreme Court, including *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986), *reh. den.* 478 U.S. 1014 (1986).

### **Equal Rights Advocates**

Equal Rights Advocates (ERA) is one of the country's oldest women's law centers. ERA is dedicated to empowerment of women through the establishment of their economic, social, and political equality. Beginning in 1974 as a teaching law firm specializing in issues of sex-based discrimination, ERA has evolved into a legal organization with a multifaceted approach to addressing women's issues including litigation, advice and counseling, public education and public policy initiatives. Since its early days, ERA has worked to end sexual harassment. ERA represented the plaintiff in the first case in the Ninth Circuit Court of Appeals to find sexual harassment a violation of Title VII, *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). ERA has continued its efforts to eradicate sexual harassment through litigation, public policy initiatives, and counseling hundreds of individual women on their legal rights, and was co-counsel in *Doe v. Petaluma City School District*, the first case to recognize a cause of action for peer sexual harassment under Title IX.

### **NOW Legal Defense and Education Fund**

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in

support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is eliminating barriers that deny women and girls equal opportunity, such as sexual harassment. For years, NOW LDEF has fought for educational equity for girls. In April 1993, NOW LDEF and the Wellesley College Center for Research on Women released the results of a survey on sexual harassment in schools that they conducted through *Seventeen* magazine. NOW LDEF was co-counsel in *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993) *reconsid. granted*, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case to recognize a cause of action for peer sexual harassment under Title IX. NOW LDEF has appeared as *amicus* in numerous other cases concerning girls' rights to be free from sexual harassment and sex discrimination in the schools, including *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028 (1992).

### **National Center for Lesbian Rights**

Founded in 1977, the National Center for Lesbian Rights (NCLR) is a national public interest law organization that advocates for women and men who confront discrimination on the basis of their sexual orientation. NCLR is particularly dedicated to combating discrimination on the basis of gender and sexual orientation in public schools, and to ensuring that all students have an equal opportunity to learn in an environment of safety and respect.

### **Northwest Women's Law Center**

The Northwest Women's Law Center (NWLC) is a non-profit public interest organization that works to advance the rights of all women through litigation, education, legislation and the provision of legal information and referral services.

Founded in 1978, the NWLC has been dedicated to challenging barriers to sexual equality in education with a focus on the barriers created by sexual harassment. Toward that end, the NWLC has participated in cases throughout the country to ensure the availability of legal remedies for victims of sexual harassment. The NWLC also conducts sexual harassment in education workshops, produces legal rights education materials on the issue, and has led numerous legislative efforts to protect and advance the legal rights and remedies available to victims of sexual harassment in school. The NWLC has a strong interest in the present case in ensuring that Title IX of the Education Amendments of 1972 is interpreted to provide the fullest possible protection to students against sexual harassment in school.

#### **Texas Civil Rights Project**

The Texas Civil Rights Project is a statewide civil rights litigation and education project. In operation since 1990, the Project seeks to promote social and economic justice. Since Fall 1993, the Texas Civil Rights Project has devoted significant resources towards Title IX litigation and education. The Project operates Stop Harassment in Public Schools (SHIPS), the nation's only full-time sexual harassment prevention project. SHIPS provides community training, conducts education research, and publishes resource on sexual harassment prevention and curriculum.

#### **Title IX Advocacy Project**

The Title IX Advocacy Project (The Project) is a youth empowerment and legal advocacy organization that works with young people and their adult allies to promote gender equity in middle schools and high schools in the greater Boston area. The Project was founded in September 1994 and currently focuses on addressing sexual harassment in schools,

discrimination against pregnant and parenting students, and gender inequity in school-based sports programs. The Project facilitates sexual harassment workshops at schools, community centers, and conferences, sponsors peer education programs, develops age-appropriate and culturally sensitive policies to remedy sexual harassment in school, and creates and disseminates resource materials for young people and adults. In January 1998 The Project will commence a "Student Representative Program" to provide legal advice and assistance to young people who face sex discrimination in their schools. To date, we have provided information and assistance to more than 2,000 students and 350 adults.

#### **Women's Legal Defense Fund**

Founded in 1971, the Women's Legal Defense Fund (WLDF) is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. WLDF has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of anti-discrimination laws. WLDF has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the federal circuit courts of appeal to advance women's opportunities in education.



6

Supreme Court, U.S.

FILED

APR 16 1998

No. 97-843

---

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

---

AURELIA DAVIS, as next friend of LASHONDA D.,  
*Petitioner,*

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,  
*Respondents.*

---

On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

---

**SUPPLEMENTAL BRIEF**

---

MARCIA D. GREENBERGER  
VERNA L. WILLIAMS \*  
DEBORAH L. BRAKE  
NEENA K. CHAUDHRY  
NATIONAL WOMEN'S LAW CENTER  
11 Dupont Circle, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 588-5180  
*Attorneys for Petitioner*

April 16, 1998

\* Counsel of Record

7/19

# TABLE OF AUTHORITIES

Cases	Page
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995) .....	3
<i>Brown v. Hot, Sexy, and Safer Prods., Inc.</i> , 68 F.3d 525 (1st Cir. 1995) .....	4, 5
<i>Brzonkala v. Virginia Polytechnic Inst. and State Univ.</i> , 132 F.3d 949 (4th Cir. 1997) .....	1
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979) .....	3
<i>Davis v. Monroe County Bd. of Educ.</i> , 120 F.3d 1390 (11th Cir. 1997) .....	2, 5
<i>Doe v. Claiborne County</i> , 103 F.3d 495 (6th Cir. 1996) .....	5
<i>Doe v. University of Illinois</i> , Nos. 96-3511, 96-4148, 1998 WL 88341 (7th Cir. Mar. 3, 1998) .....	passim
<i>Franklin v. Gwinnett County Pub. Schs.</i> , 503 U.S. 60 (1992) .....	3
<i>Fullilove v. Klutznick</i> , 448 U.S. 448 (1980) .....	3
<i>Kinman v. Omaha Pub. Sch. Dist.</i> , 94 F.3d 463 (8th Cir. 1996) .....	5
<i>Kracunas v. Iona College</i> , 119 F.3d 80 (2d Cir. 1997) .....	5
<i>Murray v. New York Univ. College of Dentistry</i> , 57 F.3d 243 (2d Cir. 1995) .....	5
<i>North Haven Bd. of Educ. v. Bell</i> , 456 U.S. 512 (1982) .....	4
<i>Oona, R.S. v. McCaffrey</i> , 122 F.3d 1207 (9th Cir. 1997) .....	2, 5
<i>Pennhurst State School &amp; Hosp. v. Halderman</i> , 451 U.S. 1 (1981) .....	4
<i>Rowinsky v. Bryan Indep. Sch. Dist.</i> , 80 F.3d 1006 (5th Cir. 1996) .....	2, 5



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

---

No. 97-843

---

AURELIA DAVIS, as next friend of LASHONDA D.,  
*Petitioner,*

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,  
*Respondents.*

---

On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

---

**SUPPLEMENTAL BRIEF**

---

1. The United States Court of Appeals for the Seventh Circuit recently decided a student-to-student sexual harassment case, *Doe v. University of Illinois*, Nos. 96-3511, 96-4148, 1998 WL 88341 (7th Cir. Mar. 3, 1998), which exacerbates the circuit splits identified in the Petition for Writ of Certiorari. The Seventh Circuit held that Title IX requires schools to take prompt and appropriate measures to remedy peer hostile environment sexual harassment of which they have actual knowledge and that Title VII principles are applicable to the analysis of such claims. With this decision, the division among the Circuits has become more pronounced. When Petitioner filed her reply brief on January 6, 1998, the Fourth Circuit had ruled that peer sexual harassment was actionable under Title IX; however, that court has since vacated the decision and reheard the case *en banc*. See *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 132 F.3d 949 (4th Cir. 1997), *vacated and reh'g en banc granted*, No. 96-1814 (4th Cir. Feb. 5, 1998). The Seventh Circuit now joins

other courts in recognizing a cause of action for student-to-student harassment, but diverges from those decisions in key respects.

2. The Seventh Circuit has aligned itself with the Ninth Circuit in recognizing that peer hostile environment sexual harassment can violate Title IX. *See Oona, R.S. v. McCaffrey*, 122 F.3d 1207, 1210-11 (9th Cir. 1997) (holding that school officials had a well-established duty under Title IX to remedy student-to-student sexual harassment). In this regard, the court considered and rejected cases from the Fifth and Eleventh Circuits, including the decision below, which have held that peer sexual harassment is not cognizable under Title IX. *See Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996); *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997).

Characterizing *Rowinsky* as "fatal[ly] flaw[ed]," the Seventh Circuit observed that the decision "fundamentally misunderstands the nature of the claim that plaintiffs in this kind of case advance." *Doe*, 1998 WL 88341, at \*9. The court noted that the Fifth Circuit assumed that the aggrieved parties in *Rowinsky* sought to hold the school liable for the actions of non-agents, misapprehending the fact that liability in peer harassment cases is based on a school's "own actions and inaction in the face of its knowledge that the harassment was occurring." *Id.* The court further observed that the Fifth Circuit's holding was based on a constricted reading of Title IX's proscription against sex discrimination that would allow schools to "ignore the more frequent complaints of sexual harassment from girls, while imposing only the minimal cost that such schools would be required likewise to ignore any complaints . . . from their male students," a result clearly at odds with Title IX's goals. *Id.*

The Seventh Circuit also repudiated the decision below, finding that it was based on the premise that Congress enacted Title IX solely pursuant to its authority under the Spending Clause. *Doe*, 1998 WL 88341, at \*10. The Seventh Circuit held that Congress relied both on its

Spending Clause powers and its authority under Section 5 of the Fourteenth Amendment to enact Title IX. *Id.* at \*6. The court explained that since "protecting Americans against 'invidious discrimination of any sort, including that on the basis of sex,' is a central function of the federal government," and since Title IX proscribes such discrimination, the statute was, in part, a proper exercise of Congress' authority under the Fourteenth Amendment. *Id.* (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 678 (1979)). In this connection, the Seventh Circuit recognized that Congress may act pursuant to more than one source of power when passing a single piece of legislation.<sup>1</sup> *Id.* at \*5.

In addition, the Seventh Circuit held that the Eleventh Circuit misconstrued the implications of characterizing Title IX as purely Spending Clause legislation. The court observed that the decision below "ignored" *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), in concluding that Congress failed to provide educational institutions with unambiguous notice of potential liability under Title IX for peer harassment. *Id.* at \*10. Instead, the Seventh Circuit, relying on *Franklin*, held that failing to remedy known sexual harassment is intentional discrimination, and where intentional discrimination is involved, the notice requirement of Spending Clause legislation is not a concern. *See id.* More specifically, the court explained:

If, as alleged, school and University officials knew about the harassment and intentionally failed, and indeed flatly refused in some instances, to take steps to address it, then the plea that the institution was

<sup>1</sup> The court noted that there have been numerous instances where Congress has used more than one source of authority in enacting legislation, citing as example, *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980), *overruled on other grounds by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), in which the Supreme Court found that Congress used an "amalgam" of its powers when it enacted the "minority business enterprise" provision of the Public Works Employment Act of 1977. *Doe*, 1998 WL 88341, at \*5.



not 'on notice' that such failure could subject it to Title IX liability rings hollow.

*Id.* at \*11.

The Seventh Circuit also concluded that the court below read Title IX too narrowly and failed to consider the Department of Education's interpretation of the statute. The court reasoned that the statute's emphasis on "safeguarding" students and this Court's mandate that Title IX be construed expansively, *see North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982), "certainly support[] the proposition that a school may be liable for refusing to act upon its responsibility to operate a program in which all persons are free from the kind of exclusion and discrimination the statute forbids." *Doe*, 1998 WL 88341, at \*13.<sup>2</sup> The court also found that the Department of Education's interpretation of Title IX, as set forth in its sexual harassment policy guidance, "reflects longstanding OCR policy." *Id.* at \*15. In this regard, the court criticized the Eleventh Circuit for giving insufficient consideration to the Department's views in analyzing the student-to-student sexual harassment case at issue. *Id.*

3. *Doe* also intensifies the split over the application of Title VII principles in determining school liability for hostile environment claims under Title IX. In holding, as a general matter, that Title VII principles should guide its determination of such matters, the Seventh Circuit joins the First, Second, Sixth, Eighth and Ninth Circuits on this issue and aligns itself against the Fifth and Eleventh Circuits.<sup>3</sup>

<sup>2</sup> The court rejected the Eleventh Circuit's reading of *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), noting that "Congress need not . . . spell out in advance every situation to which it wishes a statute to apply" and that "no party to the present case could seriously dispute that Title IX imposes obligations upon schools that receive federal funds to avoid discrimination on the basis of sex." *Doe*, 1998 WL 88341, at \*12.

<sup>3</sup> Compare *Brown v. Hot, Sexy, and Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995) (applying Title VII principles to analysis

The court held that Title VII precedent should inform the analysis of Title IX claims, observing that "there is no reason why students . . . should be afforded a lesser degree of protection against such 'hostile environment' discrimination than adult workers in the employment setting regulated by Title VII." *Doe*, 1998 WL 88341, at \*13. By adopting an actual knowledge standard, however, the court diverged from other Circuits that would hold schools liable for failing to respond to harassment of which they should have known. *See, e.g., Oona*, 122 F.3d at 1209-10; *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249-50 (2d Cir. 1995). Thus, *Doe* further exacerbates the division among circuit courts regarding whether, and to what extent, Title VII principles should be imported into the Title IX setting.

#### CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARCIA D. GREENBERGER  
VERNA L. WILLIAMS \*  
DEBORAH L. BRAKE  
NEENA K. CHAUDHRY  
NATIONAL WOMEN'S LAW CENTER  
11 Dupont Circle, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 588-5180  
*Attorneys for Petitioner*

April 16, 1998

\* Counsel of Record

of Title IX claim), *Kracunas v. Iona College*, 119 F.3d 80, 86-88 (2d Cir. 1997) (same), *Doe v. Claiborne County*, 103 F.3d 495, 514-15 (6th Cir. 1996) (same), *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996) (same), and *Oona*, 122 F.3d at 1210 (same), *with Davis*, 120 F.3d at 1400 n.13 (rejecting Title VII principles), and *Rowinsky*, 80 F.3d at 1016 (same).

1

Supreme Court, U.S.  
FILED  
AUG 7 1998  
OFFICE OF THE CLERK

No. 97-843

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1997

AURELIA DAVIS, as next friend of LASHONDA D.,  
*Petitioner,*  
v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,  
*Respondents.*

On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

SUPPLEMENTAL BRIEF

MARCIA D. GREENBERGER  
VERNA L. WILLIAMS \*  
NEENA K. CHAUDHRY  
NATIONAL WOMEN'S LAW CENTER  
11 Dupont Circle, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 588-5180  
*Attorneys for Petitioner*  
\* Counsel of Record

August 7, 1998



799



# TABLE OF AUTHORITIES

CASES	Page
<i>Bruneau v. South Kortright Sch. Dist.</i> , 962 F. Supp. 301 (N.D.N.Y. 1997) .....	4
<i>Brzonkala v. Virginia Polytechnic Inst. and State Univ.</i> , 132 F.3d 949 (4th Cir. 1997) .....	4
<i>Burlington Indus. v. Ellerth</i> , 118 S. Ct. 2257 (1998) .....	4
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979) .....	3
<i>Davis v. Monroe County Bd. of Educ.</i> , 120 F.3d 1390 (11th Cir. 1997) .....	3, 4
<i>Doe v. University of Illinois</i> , 138 F.3d 653 (7th Cir. 1998) .....	3, 4
<i>Faragher v. City of Boca Raton</i> , 118 S. Ct. 2275 (1998) .....	4
<i>Franklin v. Gwinnett County Pub. Schs.</i> , 503 U.S. 60 (1992) .....	passim
<i>Gebser v. Lago Vista Indep. Sch. Dist.</i> , 118 S. Ct. 1989 (1998) .....	passim
<i>Linson v. University of Pennsylvania</i> , 1996 WL 637810 (E.D. Pa. 1996) .....	4
<i>Murrel v. School District No. 1</i> , No. 95-CV2882 (D. Colo. 1997) .....	4
<i>Oncale v. Sundowner Offshore Servs.</i> , 118 S. Ct. 998 (1998) .....	4
<i>Oona, R.S. v. McCaffrey</i> , 143 F.3d 473 (9th Cir. 1998) .....	3, 4
<i>Rowinsky v. Bryan Indep. Sch. Dist.</i> , 80 F.3d 1006 (5th Cir. 1996) .....	4
STATUTES	
20 U.S.C. § 1681 .....	1

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

---

No. 97-843

---

AURELIA DAVIS, as next friend of LASHONDA D.,  
*Petitioner,*

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,  
*Respondents.*

---

On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

---

**SUPPLEMENTAL BRIEF**

---

This Court's recent decision in *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998), leaves unresolved the two questions presented in the Petition for Writ of Certiorari and underscores the importance of Supreme Court review of this case. First, *Gebser* does not resolve the issues raised in *Davis*, for it does not address whether student-to-student harassment can constitute a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, or the principles for determining when such a violation occurs. Rather, moving beyond the issue resolved in *Franklin v. Gwinnett*



*County Public Schools*, 503 U.S. 60 (1992)—that teacher-student harassment can constitute a Title IX violation—*Gebser* focuses on the standard for the availability of damages in a Title IX private action for teacher-student sexual harassment. Second, the *Gebser* analysis underscores that the approach taken by the Eleventh Circuit was erroneous, further highlighting the need for clarity on this most important issue of Title IX coverage, clarity which only this Court can provide. Finally, the continuing split among the federal circuit courts on the issue, which promises to become exacerbated as additional cases proceed through the lower courts, strongly supports prompt resolution by this Court of whether Title IX supports claims of student-to-student harassment. Clear guidance from this Court is essential to ensure that schools understand their obligations under the law, that students and their parents understand the legal protections available, and that the government agencies charged with enforcing Title IX understand the scope of their authority.

1. *Gebser* does not resolve the important question of whether student-to-student sexual harassment is actionable under Title IX. The Court held that damages may be recovered in a teacher-student sexual harassment case only if “an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.” *Gebser*, 118 S. Ct. at 1993. *Gebser* builds upon this Court’s ruling in *Franklin*, which holds that Title IX recognizes a claim for teacher-student sexual harassment. However, since both cases only deal explicitly with sexual harassment in the teacher-student context, neither squarely addresses the issue of whether Title IX recognizes a claim for student-to-student harassment. Lower court confusion about the application of the *Franklin* analysis to student-to-student sexual harassment will not be cured by *Gebser*.

2. In addition, *Gebser* underscores the fact that the decision below is based on a flawed analysis of Title IX

and the importance of providing clarity on the issues raised in this case. *Davis* forecloses a cause of action for peer harassment, similarly foreclosing any remedy, including equitable relief, for a school’s failure to address such harassment under all circumstances. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*). In so holding, the Eleventh Circuit misread the Spending Clause<sup>1</sup> to require Congress to provide recipients with an explicit description of all forms of sex discrimination prohibited by Title IX. Under *Gebser*, Title IX mandates actual notice to a recipient of the alleged violation and an opportunity to remedy it before it may be held liable for damages. *Gebser* does not require, any more than *Franklin* did, that Congress explicitly address sexual harassment at all, let alone teacher-student or any other type of harassment in order that it be prohibited by Title IX. *Gebser*, 118 S. Ct. at 1998. Guidance by this Court is essential to ensure that other courts do not similarly misinterpret this Court’s holdings regarding the type of notice required under Title IX.

3. The ongoing split among the federal courts of appeal on peer sexual harassment cases, which likely will become exacerbated as additional cases proceed through the lower courts, further emphasizes the need for this Court to resolve this issue. As the Petition demonstrates, the Ninth and Seventh Circuits recognize that peer hostile environment sexual harassment can violate Title IX. *See Oona, R.S. v. McCaffrey*, 122 F.3d 1207 (9th Cir. 1997), *withdrawn, superseded, and amended on denial of reh’g* by 143 F.3d 473, 476 (9th Cir. 1998) (holding that at time of conduct in question, school officials had clearly established duty under Title IX to remedy known student-to-

<sup>1</sup> As the Petitioner stated in her August 16, 1998 Supplemental Brief, there is authority for holding that Title IX was enacted pursuant to Congress’ authority under Section 5 of the Fourteenth Amendment, as well as the Spending Clause. *See Doe v. University of Illinois*, 138 F.3d 653, 657-60 (7th Cir. 1998); *see also Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

student sexual harassment), and petition for cert. filed, 67 U.S.L.W. 3083 (U.S. June 19, 1998) (No. 98-101); *Doe v. University of Illinois*, 138 F.3d 653 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3083 (U.S. July 13, 1998) (No. 98-126). The Fourth Circuit also had aligned itself with these circuits; however, it has vacated that decision and reheard the case *en banc*. *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 132 F.3d 949 (4th Cir. 1997), vacated and reh'g *en banc* granted, No. 96-1814 (4th Cir. Feb. 5, 1998). These decisions stand in sharp contrast to those of the Fifth and Eleventh Circuits. See *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996); *Davis*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*). Three peer harassment cases currently are pending in the Second, Third, and Tenth circuit courts of appeal: *Bruneau v. South Kortright School District*, 962 F. Supp. 301 (N.D.N.Y. 1997), appeal filed, No. 97-7495 (2d Cir. Apr. 23, 1997); *Linson v. University of Pennsylvania*, 1996 WL 637810 (E.D. Pa. 1996), appeal filed, No. 97-1055 (3d Cir. Dec. 10, 1996); *Murrel v. School District No. 1*, No. 95-CV2882 (D. Colo. 1997), appeal filed, No. 97-1055 (10th Cir. Feb. 10, 1997).

This Court recently provided much-needed guidance regarding sexual harassment in the employment context under Title VII. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257 (1998); *Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998 (1998). Similar clarity for students is necessary now. As this Court has recognized, sexual harassment of students "unfortunately is an all too common aspect of the educational experience," *Gebser*, 118 S. Ct. at 2000. The liability standard governing a particular school in a Title IX peer sexual harassment case varies, and will continue to vary widely depending on where the school is located. Lower courts have evidenced great difficulty in resolving sexual harassment principles without Supreme Court guidance.

Accordingly, Supreme Court review is essential to clarify the legal standards governing Title IX peer sexual harassment claims, and, in so doing, to provide students with the sorely needed protection which currently is not available uniformly across the country.

### CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARCIA D. GREENBERGER  
VERNA L. WILLIAMS \*  
NEENA K. CHAUDHRY  
NATIONAL WOMEN'S LAW CENTER  
11 Dupont Circle, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 588-5180  
Attorneys for Petitioner  
\* Counsel of Record

August 7, 1998



8  
No. 97-843

---

**In the Supreme Court of the United States**

OCTOBER TERM, 1997

---

AURELIA DAVIS, AS NEXT FRIEND OF LASHONDA D.,  
PETITIONER

*v.*

MONROE COUNTY BOARD OF EDUCATION, ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE**

---

SETH P. WAXMAN  
*Solicitor General  
Counsel of Record*

BILL LANN LEE  
*Acting Assistant Attorney  
General*

BARBARA D. UNDERWOOD  
*Deputy Solicitor General*

BETH S. BRINKMANN  
*Assistant to the Solicitor  
General*

DENNIS J. DIMSEY

LINDA F. THOME

*Attorneys*

*Department of Justice  
Washington, D.C. 20530-0001  
(202) 514-2217*

---

2388

### QUESTION PRESENTED

Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

The question presented is:

Whether a school board can be liable under Title IX for responding with deliberate indifference to a student's repeated complaints about severe and pervasive sexual harassment by another student in the course of the school's education programs and activities.



## TABLE OF CONTENTS

	Page
Statement .....	1
Discussion .....	8
Conclusion .....	19

## TABLE OF AUTHORITIES

### Cases:

<i>Brzonkala v. Virginia Polytechnic Institute &amp; State Univ.</i> , 132 F.3d 949 (4th Cir. 1997), reh'g en banc granted, Nos. 96-1814 & 96-2316 (Feb. 5, 1998) .....	16-17
<i>Doe v. University of Illinois</i> , 138 F.3d 653 (7th Cir. 1998), petition for cert. pending, No. 98-126 ..	13, 14, 15, 16
<i>Floyd v. Waiters</i> , 133 F.3d 786 (11th Cir. 1998), petition for cert. pending, No. 97-8906 .....	12
<i>Franklin v. Gwinnett County Pub. Sch.</i> , 503 U.S. 60 (1992) .....	5, 6
<i>Gebser v. Lago Vista Indep. Sch. Dist.</i> , 118 S. Ct. 1989 (1998) .....	9, 10, 12
<i>Harris v. Forklift Systems, Inc.</i> , 510 U.S. 17 (1993) .....	11
<i>Meritor Savings Bank, FSB v. Vinson</i> , 477 U.S. 57 (1986) .....	11
<i>Oncale v. Sundowner Offshore Services, Inc.</i> , 118 S. Ct. 998 (1998) .....	11, 16, 18
<i>Oona, R.S. v. McCaffrey</i> , 143 F.3d 473 (9th Cir. 1998), petition for cert. pending, No. 98-101 .....	15, 16
<i>Rowinsky v. Bryan Indep. Sch. Dist.</i> , 80 F.3d 1006 (5th Cir. 1996), cert. denied, 117 S. Ct. 165 (1996) .....	16
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974) .....	2

# IV

Constitution, statutes and rule:	Page
U.S. Const.:	
Art. I, § 8, Cl. 1 (Spending Clause) .....	8, 10
Amend. XI .....	14
Amend. XIV, § 1 (Equal Protection Clause) .....	15
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e et seq. ....	18
Education Amendments of 1972, Tit. IX, 20 U.S.C. 1681 .....	1, 2, 8-9
42 U.S.C. 1981 .....	1
42 U.S.C. 1983 (1994 & Supp. II 1996) .....	1, 15
Fed. R. Civ. P. 12(b)(6) .....	1-2, 5
Miscellaneous:	
62 Fed. Reg. 12,034 (1997) .....	8

## In the Supreme Court of the United States

OCTOBER TERM, 1997

---

No. 97-843

AURELIA DAVIS, AS NEXT FRIEND OF LASHONDA D.,  
PETITIONER

v.

MONROE COUNTY BOARD OF EDUCATION, ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

### BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

---

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

#### STATEMENT

1. a. Petitioner filed this action under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, seeking, *inter alia*, damages and injunctive relief on behalf of her daughter, LaShonda D., against respondent Monroe County Board of Education.<sup>1</sup> Peti-

---

<sup>1</sup> Petitioner's Title IX claims against two individual school officials, her race discrimination claim under 42 U.S.C. 1981, and her various claims under 42 U.S.C. 1983 (1994 & Supp. II 1996) were dismissed by the district court under Federal Rule



tioner alleges that respondent responded with deliberate indifference to repeated complaints from herself and her daughter, then a fifth-grade student in a school administered by respondent, about severe sexual harassment of LaShonda by a male classmate, G.F., over a period of more than five months. Petitioner alleges that respondent's deliberate indifference to the complaints of sexual harassment created an intimidating, hostile, offensive, and abusive school environment for LaShonda, in violation of respondent's obligations under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, as a recipient of federal financial assistance. Pet. App. 93a-101a.

Petitioner alleges that G.F. harassed LaShonda on at least eight separate occasions at school between December 17, 1992, and May 19, 1993, during school hours.<sup>2</sup> School officials were informed about each of those incidents by LaShonda, petitioner (her mother), or both. Pet. App. 95a-97a. G.F. repeatedly attempted to touch LaShonda's breasts and vaginal area. On one occasion, G.F. rubbed his body against LaShonda in a sexually suggestive manner. *Id.* at 96a. On another occasion, G.F. put a door stop in his pants and behaved in a sexually suggestive manner toward LaShonda. *Ibid.* G.F. also directed vulgar comments to LaShonda, indicating a desire to have sexual contact with her. *Id.* at 95a-96a. After an incident on May 19, LaShonda told her mother that she "didn't know how

---

of Civil Procedure 12(b)(6), were rejected by the court of appeals, and are not before this Court. See Pet. App. 2a-3a & n.3; *id.* at 82a-90a.

<sup>2</sup> Because petitioner's complaint was dismissed for failure to state a claim, the allegations of the complaint must be taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

much longer she could keep him off her." *Id.* at 97a. As a result of that incident, G.F. was charged with and pled guilty to sexual battery. *Ibid.*

After each incident, LaShonda reported G.F.'s behavior to one or more of her teachers; she complained to at least three different teachers at the school that G.F. was sexually harassing her in classes or activities under their supervision. Pet. App. 96a-97a. Petitioner, LaShonda's mother, also complained to at least two of her daughter's teachers, and was assured that the school principal had been notified about the sexual harassment. *Ibid.* At one point, LaShonda and other girls who had been sexually harassed by G.F. wanted to go as a group to speak to the principal about the harassment, but their teacher told them that, "If he wants you, he'll call you." *Id.* at 96a. On or about May 19, petitioner spoke directly to the principal to see what action would be taken, but the principal merely stated: "I guess I'll have to threaten him (G.F.) a little bit harder." *Id.* at 97a. During that conversation, the principal asked LaShonda "why she was the only one complaining." *Ibid.*

Petitioner alleges that school officials did not discipline G.F. at any time during the period in which he was harassing LaShonda, despite LaShonda's and petitioner's repeated complaints. Pet. App. 97a. G.F. was not suspended, kept away from LaShonda, or reprimanded in any other way. *Ibid.* Moreover, school officials refused even to take minimal measures to keep G.F. away from LaShonda during a substantial part of that time. For example, LaShonda's assigned classroom seat was next to G.F. and, although LaShonda asked several times to be moved to a different seat so that she could prevent contact with

G.F., she was not permitted to do so for over three months. *Ibid.*

At the time of respondent's failure to respond to the complaints by petitioner and her daughter, respondent had no policy regarding sexual harassment. Respondent had not given its employees any training or other guidance on how to respond to complaints from students about sexual harassment. Pet. App. 98a.

As a result of respondent's inaction in response to LaShonda and her mother's repeated complaints about the continuing sexual harassment, LaShonda's ability to attend school and to perform her studies and activities was impeded. Pet. App. 97a. Her ability to concentrate on her school work was affected by her constant efforts to fend off G.F.'s sexual harassment. *Ibid.* Her grades also dropped. *Ibid.* LaShonda's mental health was affected. In April 1993, LaShonda's father discovered a suicide note she had written. *Ibid.*

Petitioner alleges that respondent engaged in deliberate indifference and intentional discrimination against LaShonda that warrants money damages and injunctive relief. Petitioner specifically alleges that, respondent, in its "failure to have a policy concerning sexual harassment of students and in their failure to respond to the complaints of this student, was willfully and deliberately indifferent." Pet. App. 98a. She alleges that respondent's deliberate indifference "to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abus[ive] school environment," in violation of Title IX. *Id.* at 100a. Respondent's "failure to take action resulted in extreme emotional damage to LaShonda." *Id.* at 100a-101a. Petitioner asserts that, "had [the school principal] intervened as was neces-

sary, the injury to LaShonda would have been mitigated and the situation would have been ended." *Id.* at 100a. In addition to damages, petitioner sought injunctive relief requiring respondent "to institute a policy providing guidance for employees in the event of sexual harassment of students by fellow students," and enjoining respondent "from discriminating against female students by failing to respond to complaints of sexual harassment." *Id.* at 102a.

b. The district court dismissed petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. Pet. App. 82a-90a. The court recognized that Title IX is enforceable through an implied cause of action, *id.* at 88a (citing *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992)), but ruled that "sexually harassing behavior of a fellow fifth grader is not part of a school program or activity." Pet. App. 88a. In the court's view, petitioner had not alleged "that the Board or an employee of the Board had any role in the harassment," and therefore "any harm to LaShonda was not proximately caused by a federally-funded educational provider." *Id.* at 88a-89a. Therefore petitioner had no cause of action under Title IX. *Id.* at 89a.

2. a. A divided panel of the Eleventh Circuit initially reversed the district court's dismissal of the Title IX claim and remanded for further proceedings. Pet. App. 62a-81a. The panel noted that, fairly construed, petitioner's complaint alleged that harm to LaShonda was proximately caused by the school officials' "failure to take action to stop the offensive acts of those over whom the officials exercised control," *id.* at 75a, thereby discriminating against petitioner and denying her the benefits of the edu-



cation program on the basis of her sex, *id.* at 66a. The panel concluded that "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment." *Id.* at 73a-74a (citing *Franklin*, 503 U.S. at 74-75). In such circumstances, "the harassed student has 'be[en] denied the benefits of, or be[en] subjected to discrimination under' th[e] educational program in violation of Title IX." *Id.* at 75a.

One panel member dissented, arguing that Title IX did not apply because neither respondent nor any of its employees was alleged to have committed an act of harassment against LaShonda. Pet. App. 80a.

b. The Eleventh Circuit granted rehearing en banc, vacated the panel's opinion, and affirmed the district court's judgment dismissing the complaint. Pet. App. 91a-92a; *id.* at 1a-45a. The en banc majority construed petitioner's complaint to allege that LaShonda had been subjected to hostile environment sexual harassment, that one teacher knew of at least four instances of harassment, that at least two other teachers and the principal each knew of at least two incidents of harassment, and that respondent took no action except to threaten G.F. with disciplinary action, *Id.* at 6a-7a & n.6. But it concluded that Title IX does not impose upon school officials any obligation "to take measures sufficient to prevent a *non-employee* from discriminating" on the basis of sex against a student. *Id.* at 22a. The en banc court characterized petitioner's claim as "seeking direct liability of the Board for the wrongdoing of a student." *Id.* at 10a.

Relying primarily on legislative history, the en banc court reasoned that Congress enacted Title IX under its Spending Clause power and that Title IX gave educational institutions that receive federal funds notice that "they must prevent their employees from themselves engaging in intentional gender discrimination," Pet. App. 21a, but not that they could be liable for failing to prevent one student from sexually harassing another, *id.* at 19a.<sup>3</sup>

Four members of the court dissented, Pet. App. 46a-61a, arguing that the plain language of Title IX makes it clear that "liability hinges upon whether the grant recipient maintained an educational environment that excluded any person from participating, denied them benefits, or subjected them to discrimination," because of sex. *Id.* at 47a. The dissent noted that this construction of the statute is supported by the interpretation of the Department of Education, Office for Civil Rights (OCR), an agency charged with enforcing Title IX, which states:

a school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the education program and results in discrimination prohibited by Title IX. . . . Thus, Title IX does not make a school

<sup>3</sup> The author of the opinion for the en banc court included two sections that were not joined by any other member of the court: a discussion of the due process rights of alleged harassers and possible suits by disciplined harassers (Pet. App. 22a-29a (Part III.B)), and a discussion of the possible number of lawsuits involving harassment by fellow students (*id.* at 30a-32a (Part III.C)). See *id.* at 33a; *id.* at 36a & n.1 (opinion of Carnes, J., concurring specially).

responsible for the actions of harassing students, but rather for its *own* discrimination in failing to remedy it once the school has notice.

*Id.* at 48a (quoting Sexual Harassment Guidance, 62 Fed. Reg. 12,034, 12,039-12,040 (1997)). The dissent disagreed with the majority's reliance on the absence of a discussion of student-on-student harassment in the legislative history of Title IX because a failure to mention it in congressional debate "does not mean that it was not encompassed within Congress's broad intent of preventing students from being 'subjected to discrimination' in federally funded education programs." *Id.* at 50a. The dissent pointed out that the majority's reasoning would call for rejection of the cause of action under Title IX recognized by the Court in *Franklin*, because it also was not mentioned during congressional debate. *Ibid.* The dissent also reasoned that sufficient notice was provided to fund recipients to satisfy the Spending Clause prerequisite for damages under Title IX, because the plain meaning of the statute "unequivocally imposes liability on grant recipients for maintaining an educational environment in which students are subjected to discrimination." *Id.* at 51a. Here, where petitioner alleges that at least three teachers and the school principal had actual knowledge of the harassment and took no meaningful action to end it, the dissent argued that the district court's dismissal of the Title IX claims against the Board should have been reversed. *Id.* at 61a.

#### DISCUSSION

The petition for a writ of certiorari should be granted. The court of appeals' ruling forecloses all claims under Title IX of the Education Amendments

of 1972, 20 U.S.C. 1681, whether for damages or for injunctive relief, for a school district's failure to respond to known sexual harassment of a student by another student. Such categorical exclusion of those claims is inconsistent with this Court's decision in *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998), with the plain language of the statute, and with the decisions of other courts of appeals. In the alternative, it would be appropriate for the Court to grant the writ, vacate the judgment below, and remand the case for reconsideration in light of *Gebser*.

1. In *Gebser*, this Court addressed the circumstances under which an educational institution receiving federal funds may be held liable in damages in an implied right of action under Title IX when a teacher sexually harasses a student. The Court concluded that damages could be recovered in such a case only when "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs" and responds with deliberate indifference. 118 S. Ct. at 1999. The Court reasoned that, because Title IX's express remedial scheme permitting termination of federal funds is predicated on notice and an opportunity for the recipient to rectify a violation, Congress also did not intend to subject recipients of federal financial assistance to damages liability when the recipient "was unaware of discrimination in its programs and is willing to institute prompt corrective measures." *Ibid.*

The *Gebser* Court's ruling about the educational institution's potential liability did not depend upon the harasser's status as an employee. In fact, the



Court expressly rejected arguments that liability should be based on agency principles of respondeat superior or constructive notice that result from the employer-employee relationship. 118 S. Ct. at 1995, 1997. Rather, the Court emphasized that the educational institution's liability rests on its own "official decision \* \* \* not to remedy the violation," not on the independent actions of its harassing employees. *Id.* at 1999.

It follows from this analysis that when school officials know that severe or pervasive sexual harassment of a student is occurring under their education programs or activities, their failure to exercise their authority to address the harassment fosters a hostile educational environment, and constitutes a violation of Title IX, whether the student's harasser is a school employee or another student. In either case, the student is required to attend school in a discriminatorily hostile or abusive environment. When school officials knowingly fail to remedy a sexually hostile or abusive environment in an education program or activity, they "subject" harassed students to that environment in violation of Title IX. And *Gebser* makes clear that when a school district responds with deliberate indifference to known incidents of sexual harassment of a student, it discriminates against that student in violation of Title IX, and the Spending Clause prerequisite for damages under Title IX is met. *Id.* at 1998-1999.

Differences between students and teachers may of course be relevant to determining an institution's liability in damages for its failure to respond adequately to incidents of sexual harassment. The words or actions of a child may not have the same meaning and impact as the words or actions of an adult teacher.

Thus, the identity of the harasser and the social context in which the incident occurs may be relevant to determining whether the harassment is sufficiently severe, persistent, or pervasive to constitute actionable harassment. See *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002-1003 (1998).<sup>4</sup> Similarly, because the means available to school systems for controlling the actions of employees differ from their means of controlling the actions of students, the harasser's status in relation to the school may be relevant in determining whether officials' response to harassment was deliberately indifferent. Differences between students and employees do not, however, justify the court of appeals' rule that, as a categorical matter, an educational institution has no obligation under Title IX to respond to complaints of sexual harassment because the harasser is another student.

Petitioner's allegations meet the *Gebser* standard. Petitioner alleges that her daughter was subjected to repeated incidents of sexual harassment by another student while at school, Pet. App. 95a-97a, that three teachers and the principal of the school had actual knowledge of the harassment, *id.* at 96a-98a, that the

---

<sup>4</sup> As the initial panel below emphasized, "a hostile environment in an educational setting is not created by a simple childish behavior or by an offensive utterance, comment, or vulgarity. Rather, Title IX is violated 'when the [educational environment] is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's [environment] and create an abusive environment.'" Pet. App. 76a-77a (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)) (citation omitted).

harassment occurred while the students were "under the supervision of \* \* \* teachers," *id.* at 96a, that the principal "was responsible for supervising discipline of the students in his school," *id.* at 98a, and that respondent responded with deliberate indifference to her complaints, *id.* at 100a. Thus, "official[s] of the recipient entity with authority to take corrective action to end the discrimination" had actual knowledge of the harassment and failed to act to stop it. *Gebser*, 118 S. Ct. at 1999.<sup>5</sup>

The court of appeals' contrary ruling failed to recognize that petitioner was making a claim against respondent for its own deliberate failure to remedy the hostile environment created by sexual harassment. The court erroneously interpreted petitioner's claim as "seeking direct liability of the Board for the wrongdoing of a student" and distinguished that from a case such as *Franklin* where, according to the court of appeals, the school was held liable directly for its employee's harassing actions. See Pet. App. 9a-10a. Thus, under the court of appeals' erroneous view, the fact that the harassing student is not an employee means that such liability does not apply. *Id.* at 22a. But *Gebser* teaches that, even in cases like *Franklin* where the harasser is an employee-agent of the

<sup>5</sup> In *Floyd v. Waiters*, 133 F.3d 786, 789-793 (1998), petition for cert. pending, No. 97-8906, the Eleventh Circuit held that a school district could be held liable, under Title IX, for its employee's harassment of a student only where the superintendent or the school board itself has actual knowledge of the harassment. That rule is inconsistent with *Gebser*, which holds the institution responsible for knowledge of harassment by those school officials—like the teachers and principal here—with the authority to take corrective action to remedy the harassment on behalf of the educational institution.

educational institution, the institution's damages liability is based not on the actions of the employee-agent, but rather on the institution's own actions in deciding whether or how to respond to complaints about sexual harassment under its education programs and activities. That is precisely the theory of liability advanced by petitioner in this case. Under *Gebser*, these allegations state a claim for damages under Title IX.<sup>6</sup>

2. The circuits are divided on the questions whether and how Title IX applies to a school's response to students' complaints of sexual harassment by other students. The issue has been addressed inconsistently by four courts of appeals, and it is pending in four others.

The Seventh and Ninth Circuits have held that Title IX requires officials of recipient educational institutions to take steps to stop known sexual harassment of students by other students in their education programs and activities. In *Doe v. University of Illinois*, 138 F.3d 653, 661 (7th Cir. 1998), petition for cert. pending, No. 98-126, the plaintiff alleged that she had been subjected to a campaign of sexual harassment by a group of students at a high school administered by the University of Illinois, that she had complained to appropriate school officials, and that school officials had failed to take meaningful action to punish the harassers or to prevent further occurrences. The plaintiff brought an action alleging, *inter alia*, violations of Title IX, and seeking dam-

<sup>6</sup> The requirements of notice and deliberate indifference announced in *Gebser* expressly apply only to damages liability. Petitioner may be able to establish a violation of Title IX, and hence entitlement to injunctive relief, without such a showing.



ages. The district court dismissed her Title IX claims. *Id.* at 655-656.<sup>7</sup>

The Seventh Circuit reversed, holding that "a Title IX fund recipient may be held liable for its failure to take prompt, appropriate action in response to student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees, provided the recipient's responsible officials actually knew that the harassment was taking place." *Doe*, 138 F.3d at 661; see also *id.* at 677-678 (Evans, J., concurring). The court ruled that such a failure to take appropriate steps in response to known sexual harassment is intentional discrimination on the basis of sex of the sort Title IX prohibits. *Id.* at 661. All three members of the panel recognized that the educational institution is liable, not for the actions of the harassing students, but for its own failure to respond to the harassment. *Id.* at 662; see *id.* at 668-669 (Coffey, J., concurring in part and dissenting in part); *id.* at 677 (Evans, J., concurring).<sup>8</sup>

<sup>7</sup> The district court also rejected the University's contention that *Doe's* Title IX claim was barred by the Eleventh Amendment. The court of appeals affirmed that judgment, holding that "Congress enacted Title IX and extended it to the States, at least in part, as a valid exercise of its powers under Section 5 of the Fourteenth Amendment," and validly abrogated the States' Eleventh Amendment immunity. 138 F.2d at 660.

<sup>8</sup> In addition to the three separate opinions of the panel on the merits, Judge Easterbrook issued a statement respecting the denial of rehearing en banc, 138 F.3d at 678-679, and Chief Judge Posner (joined by Flaum & Manion, JJ.), issued a dissent from denial of rehearing en banc, *id.* at 679-680.

Judge Easterbrook noted that the panel's holding in *Doe* that "failure to protect pupils from private aggression is a

The Ninth Circuit agrees with the Seventh Circuit on this issue. In *Oona, R. S. v. McCaffrey*, 143 F.3d 473 (9th Cir. 1998), petition for cert. pending, No. 98-101, the plaintiff alleged that, while a sixth-grade student, she had been subjected to sexual harassment by a student teacher and by other students, and that school officials knew of the harassment but failed to take action to stop it. *Id.* at 474-475. She brought an action asserting, *inter alia*, claims against individual school officials pursuant to 42 U.S.C. 1983 (1994 & Supp. II 1996) for violation of her rights under Title IX and the Equal Protection Clause. *Ibid.*<sup>9</sup> On interlocutory appeal, the Ninth Circuit affirmed a district court order denying the individual defendants' motion to dismiss on qualified immunity grounds. The court held that a school official's obligation, under Title IX, to take steps to stop sexual harassment by other students (as well as by teachers) was clearly established at the time of the incidents alleged by the plaintiff. *Id.* at 476-478. It concluded: "We do not consider what steps school officials may reasonably be required to take to address harassment by fellow students. \* \* \* We hold only that \* \* \*

species of discrimination" is based on "the original meaning of equal protection of the laws." 138 F.3d at 678. He emphasized that no active member of the Seventh Circuit expressed disagreement with that ruling; rather, they disagreed only regarding the level of knowledge and response required to be shown on the part of school officials in order to warrant imposition of liability. *Ibid.*

<sup>9</sup> The plaintiff also asserted a Title IX claim against the school district, but that claim was not before the court of appeals. 143 F.3d at 475. The court declined to address the question whether the individual defendants could be sued under Section 1983 for violations of Title IX. *Ibid.*

the duty to take reasonable steps \* \* \* is clearly established." *Id.* at 477. One member of the court dissented, arguing that qualified immunity was warranted because the law was not clearly established at the time of the alleged incidents. *Id.* at 478-479.

By contrast, the Fifth Circuit has held that school districts may be liable for damages under Title IX in some cases of sexual harassment by fellow students, but only when school officials treat complaints of harassment by students of one sex differently from complaints by students of the other sex. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996), cert. denied, 117 S. Ct. 165 (1996).<sup>10</sup>

The Eleventh Circuit stands alone in holding that school officials have no responsibility at all, under Title IX, to respond to complaints by students about sexual harassment in the school's education program or activities if the harasser is a student.

Cases presenting the question of the applicability of Title IX to allegations of student sexual harassment by other students are now pending before the Second, Third, Fourth, and Tenth Circuits. See *Bruneau v. South Kortright Central Sch. Dist.*, No. 97-7495 (2d Cir. argued Dec. 12, 1997); *Linson v. University of Pennsylvania*, No. 96-2098 (3d Cir. submitted June 17, 1997; held pending this Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, No. 96-568); *Brzonkala v. Virginia Polytechnic Institute and State Univ.*, 132 F.3d 949 (4th Cir. 1997)

<sup>10</sup> In *Doe*, the Seventh Circuit criticized *Rowinsky* for mischaracterizing the plaintiff's claim as an effort to hold the school liable for the acts of harassing students, when the plaintiff's claim actually was based on the schools' "own actions and inaction in the face of its knowledge that the harassment was occurring." 138 F.3d at 662.

(holding that an educational institution may be held liable under Title IX if it knew or should have known of sexually hostile environment caused by peer harassment and failed to remedy it), reh'g en banc granted, Nos. 96-1814 & 96-2316 (Feb. 5, 1998) (argued Mar. 3, 1998); *Murrell v. School Dist. No. 1*, No. 97-1055 (10th Cir. argued March 18, 1998).

These decisions show that the courts of appeals are in great disarray as to when, if ever, a school district may be liable under Title IX for responding with deliberate indifference to known sexual harassment of students by students or other non-employees. Ordinarily after the announcement of a new rule of law such as the one announced in *Gebser*, this Court remands related cases for reconsideration in light of the newly announced legal principles. For several reasons, however, we suggest that it would be more appropriate for the Court to grant review on the merits in this case. First, while *Gebser* points strongly in the direction of recognizing liability of a school district for failure to respond adequately to known sexual harassment of students by other students, it does not squarely address the issue, and thus does not directly respond to the Eleventh Circuit's observation that the Supreme Court has never squarely addressed Title IX liability in the context of student-on-student sexual harassment (Pet. App. 9a, 19a n.13). Second, the division among the courts of appeals on this issue involves four circuits, and is unlikely to be eliminated by a remand in this case and in others raising similar issues in petitions pending before this Court; the frequency with which the issue arises suggests that a definitive resolution by this Court is needed. Third, this Court's resolution of the issue is not likely to be aided by additional decisions



from the numerous courts of appeals in which the matter is pending. Litigation in the lower courts may well illuminate subsidiary issues, such as which school officials must receive notification of the harassment before liability accrues, and what constitutes an adequate response. But on the basic question presented by this case—whether such liability can ever exist—additional litigation can shed little additional light. In this respect, the case is in a similar posture to *Oncale v. Sundowner Services, Inc.*, 118 S. Ct. 998 (1998), in which this Court reviewed a holding by a court of appeals that same-sex sexual harassment is categorically not actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

For these reasons, the Court should grant certiorari to resolve the conflict, and to correct the error of the Eleventh Circuit in holding that federal fund recipients have no obligation under Title IX to address known sexual harassment of students by other students.

## CONCLUSION

The petition for a writ of certiorari should be granted to review the court of appeals' ruling that educational institutions have no obligation under Title IX to take steps to address known instances of sexual harassment of students by other students. Alternatively, the petition should be granted, the judgment vacated, and the case remanded for reconsideration in light of *Gebser*.

Respectfully submitted.

SETH P. WAXMAN  
*Solicitor General*

BILL LANN LEE  
*Acting Assistant Attorney  
General*

BARBARA D. UNDERWOOD  
*Deputy Solicitor General*

BETH S. BRINKMANN  
*Assistant to the Solicitor  
General*

DENNIS J. DIMSEY  
LINDA F. THOME  
*Attorneys*

AUGUST 1998

(5)  
No. 97-843

Supreme Court, U. S.

FILED

NOV 10 1998

CLERK

In The

Supreme Court of the United States

October Term, 1998

Aurelia Davis, as next friend of LaShonda D.,

*Petitioner,*

v.

Monroe County Board of Education, *et al.*,

*Respondents.*

**On Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit**

**BRIEF FOR THE PETITIONER**

Deborah L. Brake  
Professor of Law  
University of Pittsburgh  
School of Law  
3900 Forbes Avenue  
Room 322  
Pittsburgh, PA 15260

Nancy Perkins  
Stevenson Munro  
Arnold & Porter  
555 12th Street, N.W.  
Washington, D.C. 20004

*Of Counsel*

November 10, 1998

Marcia D. Greenberger  
Verna L. Williams\*  
Leslie T. Annexstein  
Neena K. Chaudhry  
National Women's Law Center  
11 Dupont Circle, N.W., Suite 800  
Washington, D.C. 20036  
(202) 588-5180

*Attorneys for Petitioner*

\*Counsel of Record

RECEIVED  
HAND DELIVERED  
NOV 10 1998  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

RECEIVED  
SUPREME COURT, U.S.  
CLERK'S OFFICE

118 PP



## QUESTION PRESENTED

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which prohibits sex discrimination in federally funded education programs and activities, recognizes a cause of action for peer hostile environment sexual harassment.

## LIST OF PARTIES

The parties to the proceeding below were the Petitioner Aurelia Davis, as next friend of her daughter, LaShonda D., and the Respondents Monroe County Board of Education, Bill Querry, and Charles Dumas.

## TABLE OF CONTENTS

QUESTION PRESENTED .....	i
LIST OF PARTIES .....	ii
OPINIONS BELOW .....	1
JURISDICTION .....	2
STATUTE INVOLVED .....	2
STATEMENT OF THE CASE .....	2
A. Introduction .....	2
B. Background Facts .....	3
C. Proceedings Below .....	5
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	11
I. TITLE IX'S BROAD PROHIBITION AGAINST SEX DISCRIMINATION COVERS STUDENT- TO-STUDENT SEXUAL HARASSMENT. ....	11
A. Title IX's Plain Language and Legislative History Support Covering Student-to-Student Sexual Harassment. ....	11
1. The Statutory Language is Broad. ....	11
2. Title IX's Legislative History	



	Demonstrates Congress' Intent to Cover Peer Harassment. ....	16
B.	The Decision Below Ignores this Court's Precedents Which Support Title IX Coverage of Student-to- Student Sexual Harassment. ....	25
1.	<i>Gebser</i> and <i>Franklin</i> Make Clear that the Spending Clause is No Bar to Title IX Coverage of Student-to-Student Sexual Harassment. ....	27
2.	<i>Gebser</i> Makes Clear that Educational Institutions May be Held Liable under Title IX for Their Own Response to Sexually Hostile Environments, Whether Created by Teachers or Students. ....	30
II.	THE DEPARTMENT OF EDUCATION RECOGNIZES THAT STUDENT-TO-STUDENT SEXUAL HARASSMENT IS COVERED UNDER TITLE IX. ....	34
A.	The Department of Education's Policy Guidance Covers Peer Hostile Environment Sexual Harassment. .....	34
B.	The Department's Enforcement Actions Have Long Required	

	Recipients to Remedy Sexually Hostile Environments Created by Students. ....	36
C.	The Department's Interpretation of Title VI Further Supports Its Application of Title IX to Peer Sexual Harassment. ....	37
III.	PETITIONER HAS STATED A CLAIM FOR RELIEF UNDER TITLE IX. ....	42
	CONCLUSION .....	46

## TABLE OF AUTHORITIES

### CASES:

<i>Atascadero State Hosp. v. Scanlon</i> , 473 U.S. 234 (1985) . . .	23
<i>Bennett v. Kentucky Dep't of Educ.</i> , 470 U.S. 656 (1985) . . .	28
<i>Board of Comm'rs v. Brown</i> , 117 S. Ct. 1382 (1997) . . . . .	43
<i>Bowman v. County Sch. Bd.</i> , 382 F.2d 326 (4th Cir. 1967) . . . . .	41
<i>Brzonkala v. Virginia Polytechnic Inst.</i> , 132 F.3d 949 (4th Cir. 1997) . . . . .	12
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979) . . . . .	<i>passim</i>
<i>Canton v. Harris</i> , 489 U.S. 378 (1989) . . . . .	43, 44
<i>Chevron v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984) . . . . .	34
<i>Coppedge v. Franklin County Bd. of Educ.</i> , 273 F. Supp. 289 (E.D.N.C. 1967) . . . . .	41
<i>Crawford v. Davis</i> , 109 F.3d 1281 (8th Cir. 1997) . . . . .	27
<i>Doe v. Londonderry Sch. Dist.</i> , 970 F. Supp. 64 (D.N.H. 1997) . . . . .	12
<i>Doe v. Petaluma City Sch. Dist.</i> , 830 F. Supp. 1560 (N.D.	

Cal. 1993) . . . . .	12
<i>Doe v. University of Illinois</i> , 138 F.3d 653 (7th Cir. . . . .	27
<i>Faragher v. City of Boca Raton</i> , 118 S. Ct. 2275 (1998) . . . . .	15
<i>Franklin v. Gwinnett County Pub. Sch.</i> , 503 U.S. 60 (1992) . . . . .	<i>passim</i>
<i>Franks v. Kentucky Sch. for the Deaf</i> , 142 F.3d 360 (6th Cir. 1998) . . . . .	27
<i>Garrett v. Board of Educ.</i> , 775 F. Supp. 1004 (E.D. Mich. 1991) . . . . .	37
<i>Gebser v. Lago Vista Ind. Sch. Dist.</i> , 118 S. Ct. 1989 (1998) . . . . .	<i>passim</i>
<i>Georgia Dep't of Med. Assistance v. Shalala</i> , 8 F.3d 1565 (11th Cir. 1993) . . . . .	36
<i>Green v. County Sch. Bd.</i> , 391 U.S. 430 (1968) . . . . .	40
<i>Griffin v. Breckenridge</i> , 403 U.S. 88 (1971) . . . . .	27
<i>Grove City College v. Bell</i> , 465 U.S. 555 (1984) . . . . .	23
<i>Kent v. Derwinski</i> , 790 F. Supp. 1032 (E.D. Wash. 1991) . . . . .	39
<i>Lee v. Macon County Bd. of Educ.</i> , 267 F. Supp. 458 (M.D. Ala.) . . . . .	41
<i>Modesto City Sch.</i> , OCR Case No. 09-93-1391 . . . . .	12



<i>Monteiro v. Tempe Union High Sch. Dist.</i> , No. 97-15511, 1998 WL 727338 (9th Cir. Oct. 19, 1998) .....	38, 40, 43
<i>Morse v. Regents of Univ. of Colo.</i> , 154 F.3d 1124 (10th Cir. 1998) .....	44
<i>Moses v. Washington Parish School Board</i> , 302 F.Supp. 362 (E.D. La. 1969) .....	41
<i>National R.R. Passenger Corp. v. Boston &amp; Maine Corp.</i> , 503 U.S. 407 (1992) .....	36
<i>North Haven Bd. of Educ. v. Bell</i> , 456 U.S. 512 (1982) .....	<i>passim</i>
<i>Oncale v. Sundowner Offshore Serv.</i> , 118 S. Ct. 998 (1998) . .....	15, 33
<i>Oona R.-S. v. Santa Rosa City Sch.</i> , 890 F. Supp 1452 (N.D. Cal. 1995) .....	12
<i>Patricia H. v. Berkeley Unified Sch. Dist.</i> , 830 F. Supp. 1288 (N.D. Cal. 1993) .....	36
<i>Pendleton v. Jefferson Local Sch. Dist. Bd. of Educ.</i> , 958 F.2d 372 (6th Cir. 1992) .....	40
<i>Pennhurst State Sch. &amp; Hosp. v. Halderman</i> , 451 U.S. 1 (1981) .....	27, 28
<i>Roberts v. Colorado State Bd. of Agric.</i> , 998 F.2d 824 (10th Cir. 1993) .....	37
<i>Rowinsky v. Bryan Indep. Sch. Dist.</i> , 80 F.3d 1006 (5th Cir.	

1996) .....	<i>passim</i>
<i>Smiley v. Citibank</i> , 517 U.S. 735, 740 (1996) .....	36
<i>Stell v. Board of Pub. Educ.</i> , 387 F.2d 486 (5th Cir. 1967) 41	
<i>Taylor v. Garrett</i> , 820 F. Supp. 933 .....	39
<i>United States v. Jefferson County Bd. of Educ.</i> , 380 F.2d 385 (5th Cir. 1967) .....	41
<i>Williams v. Saxbe</i> , 413 F. Supp. 654 (D.D.C. 1976) .....	18
STATUTES:	
28 U.S.C. § 1254(1) .....	2
Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7 .....	8, 23
Civil Rights Restoration Act of 1988, 20 U.S.C. § 1687..... .....	8, 23
Developmentally Disabled Assistance and Bill of Rights Act ("DDA"), 42 U.S.C. § 6001 <i>et seq</i> .....	28
Section 504 of the Rehabilitation Act of 1973 (codified as amended at 29 U.S.C. § 794) .....	39, 40
Title I of the Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27, 20 U.S.C. § 2701 <i>et seq</i> . . . .....	28, 29

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ..... *passim*

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d .  
..... *passim*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e  
*et seq.* ..... *passim*

#### REGULATIONS:

29 C.F.R. § 1604.11(d), (e) ..... 15

34 C.F.R. § 100.3(c) ..... 38

34 C.F.R. pt. 100, App.B. .... 38

34 C.F.R. § 106 ..... *passim*

40 Fed. Reg. 24,128 (1975) ..... 20

#### LEGISLATIVE HISTORY:

117 Cong. Rec. 30,407 (1971) ..... 19

118 Cong. Rec. 5803 (1972) ..... *passim*

118 Cong. Rec. 5982 (1972) ..... 27

121 Cong. Rec. 21,510 (1975) ..... 21

121 Cong. Rec. 23,846 (1975) ..... 22

122 Cong. Rec. 31,372 (1976) ..... 37

122 Cong. Rec. 28,134 (1976) ..... 22

130 Cong. Rec. 9632 (1984) ..... 25

131 Cong. Rec. 22,346 (1985) ..... 27

132 Cong. Rec. 28,624 (1986) ..... 27

*Discrimination Against Women: Hearings on Section 805 of H.R. 16,098 before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor, 91st Cong., pt. 1, at 589 (1970)* ..... 18

*Joint Hearings before the Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary on H.R. 700 (The Civil Rights Restoration Act of 1985) 98th Cong. 27* ..... 24, 25

S. Rep. No. 100-64 (1987) ..... 19

*Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor, 94th Cong. 1 (1975)* ..... 20, 21

#### MISCELLANEOUS:

Letter from Richard W. Riley, Secretary of Educ., Aug. 28, 1998 . .... 32



Letter of Findings by John E. Palomino, Reg'l Civil Rights  
Dir., Region IX (May 5, 1989), Docket No. 09-89-1050 . 36

Letter of Findings by John E. Palomino, Reg'l Civil Rights  
Dir., Region IV (July 24, 1992), Docket No. 09-92-6002  
..... 36

Letter of Findings by Kenneth A. Mines, Reg'l Civil Rights  
Dir., Region V (Apr. 23, 1993), Docket No. 05-92-1174 . 36

Myra and David Sadker, *Failing at Fairness: How  
America's Schools Cheat Girls* (1994) ..... 12

Nan Stein, *et al.*, *Secrets in Public: Sexual Harassment in  
Our Schools* (1992) ..... 13

Rule 12(b)(6) of the Federal Rules of Civil Procedure .... 6

*Racial Incidents and Harassment Against Students at  
Educational Institutions; Investigative Guidance*, 59 Fed.  
Reg. 11,449 (1994) ..... *passim*

*Sexual Harassment Guidance: Harassment of Students by  
School Employees, Other Students, or Third Parties; Final  
Policy Guidance*, 62 Fed. Reg. 12,034 (Mar. 13, 1997) .....  
..... *passim*

*Survey of School Desegregation in the Southern and Border  
States, 1965-66* (1966) ..... 42

No. 97-843

---

**In The  
Supreme Court of the United States**

**October Term, 1998**

---

Aurelia Davis, as next friend of LaShonda D.,

*Petitioner,*

v.

Monroe County Board of Education, *et al.*,

*Respondents.*

---

**On Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit**

---

**BRIEF FOR THE PETITIONER**

---

**OPINIONS BELOW**

The *en banc* opinion of the Court of Appeals is  
reported at 120 F.3d 1390 (11th Cir. 1997). Pet. App. at 1a.  
The opinion of the three-judge panel of the Court of Appeals

is reported at 74 F.3d 1186 (11th Cir. 1996). Pet. App. at 62a. The order vacating the three-judge panel decision and granting the petition for rehearing *en banc* is reported at 91 F.3d 1418 (11th Cir. 1996). Pet. App. at 91a. The opinion of the district court in this case is reported at 862 F. Supp. 363 (M.D. Ga. 1994). Pet. App. at 82a.

## **JURISDICTION**

The Court of Appeals entered its judgment on August 21, 1997. Petitioner timely filed her petition for writ of certiorari on November 19, 1997, which was granted by this Court on October 6, 1998. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

## **STATUTE INVOLVED**

The pertinent provision of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX") is set forth below:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

## **STATEMENT OF THE CASE**

### **A. Introduction**

Petitioner Aurelia Davis brings this action against the

Monroe County Board of Education ("Board"),<sup>1</sup> on behalf of her minor daughter, LaShonda D. Mrs. Davis alleges that LaShonda was sexually harassed in school by another student and that the Board knowingly tolerated, condoned, and was deliberately indifferent to the misconduct, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, *inter alia*.<sup>2</sup> The district court dismissed her suit, holding that Title IX does not cover a school's failure to address or remedy peer hostile environment sexual harassment. A divided three-judge panel of the court of appeals reversed, ruling that Title IX requires educational institutions to address instances of student-to-student sexual harassment of which they knew or should have known. Sitting *en banc*, a divided court of appeals vacated that decision and affirmed the judgment of the district court.

### **B. Background Facts**

Mrs. Davis' claim arises out of a five-month pattern of sexual harassment targeting LaShonda, repeated complaints by LaShonda and her mother to school officials about it, and the school's refusal to take any meaningful actions to stop the misconduct. The unchecked harassment began in December 1992, when LaShonda was a fifth-grade student at Hubbard Elementary School in Forsyth, Georgia, and persisted until May of 1993, diminishing LaShonda's academic performance and her emotional well-being in the

---

<sup>1</sup> The Board is a recipient of federal financial assistance and therefore covered by Title IX. Pet. App. at 99a.

<sup>2</sup> The complaint also alleged individual claims against Superintendent Charles Dumas and Principal Bill Querry, and additional claims against the Board for violation of LaShonda's constitutional rights and for racial discrimination. However, only the Title IX claim against the Board is properly before this Court.



process. Pet. App. at 95a, 97a, 100a.

In the first of several instances, starting in December of 1992, a classmate identified as "G.F." repeatedly attempted to touch LaShonda's breasts and vaginal area and told her in vulgar terms that he "want[ed] to feel her boobs" and "want[ed] to get in bed" with her. *Id.* Both LaShonda and her mother reported these incidents to classroom teacher Mrs. Diane Fort. *Id.* at 96a. In January 1993, Mrs. Fort assured Mrs. Davis that the principal had been informed about the harassment. *Id.* at 96a.

The harassment continued, as did the complaints and requests for assistance by LaShonda and Mrs. Davis. In February 1993, G.F. placed a doorstop in his pants and behaved in a sexually suggestive and harassing manner. *Id.* This time, LaShonda and her mother complained to Coach Whit Maples and Mrs. Joyce Pippin, the teachers in whose classes this misconduct occurred. *Id.* In March 1993, LaShonda and other girls whom G.F. had sexually harassed tried to arrange a meeting with Principal Querry, but Mrs. Fort refused to allow them to proceed, stating "[i]f he wants you, he'll call you." *Id.* In April 1993, G.F. rubbed against LaShonda in a sexual manner in the school's hallways as the students went to lunch. *Id.* LaShonda reported this incident as well to Mrs. Fort. *Id.* In an attempt to avoid contact with G.F., LaShonda also repeatedly asked Mrs. Fort during this period to change her assigned seat next to the boy; however, Mrs. Fort denied these requests for over three months. *Id.* at 97a.

By May 1993, G.F.'s sexual harassment of LaShonda had persisted for five months; school officials still had not responded to her requests for help. *Id.* LaShonda told her mother at that time that she "didn't know how much longer

she could keep [G.F.] off her." *Id.* at 96a-97a. Mrs. Davis then contacted Principal Querry directly to urge him to take specific action to protect her daughter. *Id.* at 97a. Mr. Querry responded by saying he "guess[ed he would] have to threaten [G.F.] a little bit harder," and asking LaShonda "why she was the only one complaining." *Id.* With no response forthcoming from the school, in May 1993, G.F. was charged with and pled guilty to sexual battery. *Id.*

Throughout this five-month pattern of sexual harassment, neither the teachers nor the Board ever disciplined G.F. *Id.* In addition, the Board had no policy prohibiting the sexual harassment of students in its schools at this time; nor did it have any plan of action or guidance to assist employees in handling, or students in reporting, such misconduct. *Id.* at 98a. Additionally, the Board did not provide any training to its employees instructing them on how to respond to incidents of sexual harassment of students. *Id.*

The sexual harassment LaShonda endured, and the refusal of the school to take steps to end it, interfered with her ability to benefit from the education the Board provided at Hubbard. *Id.* at 100a. LaShonda's ability to concentrate diminished, causing her grades, previously all A's and B's, to suffer. *Id.* at 97a. In addition, the harassment affected her mental and emotional well-being, as evidenced by a suicide note she wrote, which her father found in April 1993. *Id.*

### C. Proceedings Below

Mrs. Davis filed a complaint against the Board in the United States District Court for the Middle District of Georgia on May 4, 1994, alleging, *inter alia*, a violation of Title IX and seeking equitable relief and compensatory

damages. Pet. App. at 93a.

The district court dismissed Mrs. Davis' claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure on August 29, 1994. The court concluded that the Board's failure to respond to the repeated complaints of Mrs. Davis and LaShonda did not violate Title IX because "[t]he sexually harassing behavior of a fellow fifth grader is not part of a school program or activity." *Davis v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 367 (M.D. Ga. 1994). Pet. App. at 88a. The district court found that because neither the Board nor its employees "had any role in the harassment . . . any harm to LaShonda was not proximately caused by a federally funded education provider." *Id.*

On February 14, 1996, a divided panel of the Eleventh Circuit Court of Appeals reversed the district court's decision. The panel held that Title IX encompasses a cause of action when a school district fails to address and remedy a hostile environment created by a student's sexual harassment of which it knew or should have known. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1188 (11th Cir.), *vacated and reh'g granted*, 91 F.3d 1418 (11th Cir. 1996). Pet. App. at 62a.

The Eleventh Circuit vacated the panel decision and granted the Board's petition for rehearing *en banc* on August 1, 1996. *Davis v. Monroe County Bd. of Educ.*, 91 F.3d 1418 (11th Cir. 1996). Pet. App. at 91a. On August 21, 1997, the Eleventh Circuit, sitting *en banc*, held that Title IX does not recognize a cause of action for peer hostile environment sexual harassment. The court found that Congress neither intended nor provided sufficient notice for educational institutions to be held liable for this form of sex

discrimination under Title IX. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1406 (11th Cir. 1997). Pet. App. at 1a. Four judges dissented, noting that the majority's decision conflicts with Title IX's language and legislative history, as well as with the precedents of this Court. *Id.* at 46a.

## SUMMARY OF ARGUMENT

1. Title IX's broad proscription against sex discrimination encompasses student-to-student sexual harassment, as evidenced by the statutory language, its legislative history, and this Court's decisions interpreting the statute.

The plain language and legislative history of Title IX, 20 U.S.C. § 1681 *et seq.*, support Title IX coverage for student-to-student sexual harassment. Title IX has broad statutory language, prohibiting sex discrimination, including sexual harassment, in federally funded education. Unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, which proscribes specific acts by employers, Title IX focuses on protecting individuals from discrimination, requiring recipients to ensure that individuals are not "excluded from participation in," "denied the benefits of," or "subjected to discrimination under" their education programs or activities. Accordingly, when a recipient fails to address or remedy sexual harassment, whether initiated by a student or a teacher, it violates the terms of the statute on its face.

Title IX's legislative history supports this reading of the statute. Congress enacted Title IX with the goal of ending the "corrosive and unjustified discrimination" confronting women and girls in education. 118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh). In this connection, Congress heard evidence regarding discrimination by non-



agents that limits the educational opportunities available to female students. Lawmakers thus drafted Title IX to be both “strong and comprehensive,” in order to eliminate such practices. *Id.* at 5804. Congress has reaffirmed that intention several times. First, Congress reviewed and approved Title IX’s implementing regulations, which hold recipients responsible for discrimination that occurs “under” their education programs or activities, even when committed by someone other than the recipient. In addition, Congress enacted provisions preserving the broad scope of Title IX following decisions by the Court that would have narrowed the statute’s coverage, passing the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7, and the Civil Rights Restoration Act of 1988, 20 U.S.C. § 1687. The repeated, consistent expressions of Congress’ intent, particularly in light of the fact that lawmakers were aware of Title IX coverage of discrimination perpetrated by persons other than agents of educational institutions, make clear that Title IX’s proscription against sex discrimination encompasses student-to-student harassment.

This Court’s decisions in *Gebser v. Lago Vista Ind. Sch. Dist.*, 520 U.S. 397, 118 S. Ct. 1989 (1998), and *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) also support Title IX coverage of student-to-student sexual harassment. Consistent with this Court’s prior rulings interpreting Title IX broadly, these decisions recognize a damages cause of action for sexual harassment. In contrast, the court below concluded erroneously that the Spending Clause requires Congress to articulate each and every cause of action that might arise under a particular statute, and that since Title IX is silent on the matter, Congress did not provide recipients with sufficient notice to be liable for peer harassment. *Gebser* and *Franklin* make plain that Title IX’s broad and unambiguous proscription against sex

discrimination provides ample notice to recipients for Spending Clause purposes.

*Gebser* and *Franklin* also make clear that educational institutions may be held liable for peer harassment under Title IX for their own response to a sexually hostile environment, irrespective of whether it is created by teachers or students. The court below attempts to distinguish teacher-to-student harassment from peer harassment based on the fact that teachers are agents of institutions and students are not. Under *Gebser* and *Franklin*, however, institutional liability is based on the recipient’s failure to ensure that students are not denied the benefits, excluded from, or subjected to discrimination under the education program, and not on whether the perpetrator had an agency relationship with the institution. Thus, when an institution turns its back on sexual harassment—whether by a teacher or a student—it violates the statute and must be held liable.

2. The Department of Education (“DOE”) consistently has interpreted Title IX as covering student-to-student sexual harassment, which is entitled to deference. DOE has long required recipients to remedy sex discrimination emanating from third parties, including students, in their programs through regulations and policies. In addition to promulgating regulations requiring recipients to address discrimination by third parties, DOE has issued extensive policy guidance on sexual harassment generally, including peer harassment. See “*Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties; Final Policy Guidance*,” 62 Fed. Reg. 12,034 (Mar. 13, 1997) (“*Sexual Harassment Guidance*”). The Guidance recognizes peer harassment as a violation of Title IX and requires schools to take prompt,

immediate action to remedy it and prevent its recurrence. Similarly, the enforcement actions of DOE's Office for Civil Rights (OCR) also have long required recipients to remedy sexually hostile environments created by students. These policies are premised on the obligation recipients have under Title IX to ensure that students are not subjected to discrimination, and not on the identity of the harasser.

The Department also recognizes Title VI as covering student-to-student harassment, which further supports Title IX coverage of peer harassment. DOE issued a policy guidance on student-to-student racial harassment, which, just as the Sexual Harassment Guidance, requires institutions to take prompt, appropriate steps to remedy such discrimination. See *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,449 (1994). This guidance makes clear that, just as in the Title IX context, recipients have an obligation under Title VI to ensure that students are not subjected to race discrimination occurring under their programs. Courts recognized this obligation before Title IX was enacted in the context of evaluating school responses to desegregation orders, and most recently in the Ninth Circuit, *Monteiro v. Tempe Union High Sch. Dist.*, No. 97-15511, 1998 WL 727338 (9th Cir. Oct. 19, 1998). The fact that Title VI also covers peer harassment strongly militates in favor of recognizing this cause of action since Title IX was modeled on Title VI.

3. Petitioner Davis has stated a claim for relief under Title IX. Mrs. Davis has alleged that LaShonda was subjected to a five-month pattern of severe and pervasive sexual harassment repeatedly in school, and that, despite LaShonda and her mother's repeated complaints to teachers and the principal, no meaningful action was taken to address

or remedy the misconduct. Thus, because the Board had notice of the harassment, and responded to it with deliberate indifference, Mrs. Davis has stated a claim for damages under Title IX. Equitable relief also is appropriate in a case such as this one, where the school lacked policies and procedures to address sex discrimination, and where assurance of nondiscrimination in the future is needed.

## ARGUMENT

### I. TITLE IX'S BROAD PROHIBITION AGAINST SEX DISCRIMINATION COVERS STUDENT-TO-STUDENT SEXUAL HARASSMENT.

#### A. Title IX's Plain Language and Legislative History Support Covering Student-to-Student Sexual Harassment.

##### 1. The Statutory Language is Broad.

Congress enacted Title IX to prohibit sex discrimination in federally funded education programs and activities. By its own terms, Title IX's proscription against sex-based discrimination is both direct and expansive, stating simply:

No person in the United States shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). By its broad terms, Title IX neither



enumerates the specific forms of discriminatory conduct, nor does it specify the particular actors, that fall within its broad proscription. Instead, Title IX requires educational institutions to ensure that students and others are not subjected to discrimination occurring under their programs or activities, a requirement that most assuredly is breached when an institution refuses to remedy sexual harassment, which the Court already has recognized as a form of sex discrimination that Title IX forbids. *See Gebser v. Lago Vista Indep. Sch. Dist.* 520 U.S. 397, 118 S. Ct. 1989 (1998) (recognizing a cause of action of damages for teacher-to-student sexual harassment); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (same).<sup>3</sup>

---

<sup>3</sup> Sexual harassment interferes with students' ability to benefit from and fully take advantage of their educational opportunities and experiences. This interference manifests itself in a variety of ways. For example, students who have been sexually harassed may stay away from school, refuse to participate in certain school programs, classes or activities, or even transfer to a different school in an attempt to avoid the source of harassment. *See Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 953 (4th Cir. 1997), *vacated, reh'g en banc granted* (Feb. 5, 1998); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1566 (N.D. Cal. 1993), *modified on other grounds* 949 F. Supp. 1415 (N.D. Cal. 1996); *Oona R.-S. v. Santa Rosa City Sch.*, 890 F. Supp. 1452 (N.D. Cal. 1995), *aff'd sub nom. Oona R.-S. v. McCaffrey*, 122 F.3d 1207 (9th Cir. 1997), *withdrawn, superseded, and amended on denial of reh'g* by 143 F.3d 473, 476 (9th Cir. 1998), *and petition for cert. filed*, 67 U.S.L.W. 3083 (U.S. June 19, 1998) (No. 98-101). Their grades may drop. *See Doe v. Londonderry Sch. Dist.*, 970 F. Supp. 64 (D.N.H. 1997); *Modesto City Sch.*, OCR Case No. 09-93-1391. Emotional and psychological effects of the sexual harassment, such as fear, isolation and depression have an adverse impact on student learning. *See Myra and David Sadker, Failing at Fairness: How America's Schools Cheat Girls* (1994).

This interference with students' educational opportunities is only amplified when schools refuse to respond to instances of sexual harassment. Students learn that voicing their complaints will not end the

This Court has held that Title IX should be accorded "a sweep as broad as its language" in order to give the statute "the scope its origins dictate." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982). For example, the Court has held that Title IX's protection against sex discrimination applies to employees, in part because the plain language "on its face [appears] to include employees as well as students." *Id.* at 520. The Court found that since the statute neither expressly includes nor excludes employees from coverage, it "should interpret the provision as covering and protecting these 'persons' unless other considerations counsel to the contrary." *Id.* at 521.

Title IX similarly does not limit its proscription against discrimination to actions initiated "by" recipients, rather than third parties such as students. The basic construction of Title IX itself makes clear that whether a student is the perpetrator of the sexual harassment or whether it was caused by another party in the first instance, Title IX requires educational institutions to address and remedy such discrimination. The statute focuses on the harm done to the individual in the educational program, not the identity of the person whose initial actions caused the discrimination with which it is confronted. Title IX's construction thus demonstrates Congress' intention that individuals be protected from sex discrimination if it takes place "under"

---

harassment. Students learn that voicing their complaints will not end the harassment. They may lose respect for the adults in charge of their learning environment, or they may be disciplined themselves. *See generally* Nan Stein, et al., *Secrets in Public: Sexual Harassment in Our Schools* (1992). Thus, when schools do not respond promptly and appropriately to sexual harassment, students are deprived of their educational opportunities and experiences.

the educational program, or if it causes educational benefits to be denied, or exclusion to result, whatever the discrimination's initial source. Moreover, the fact that Title IX "neither expressly nor impliedly excludes" this form of sex discrimination from its reach, counsels in favor of "interpret[ing] the provision as covering" such misconduct.<sup>4</sup>

This broad statutory construction is even more expansive than the formulation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which prohibits sex discrimination in the workplace. Title VII provides, with respect to employers:

It shall be an unlawful employment practice for an employer --

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to

---

<sup>4</sup> *North Haven*, 456 U.S. at 521.

deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1)-(2). Title VII's focus thus is on actions taken by "an employer." Title IX, on the other hand, was drafted, as this Court has recognized, "with an unmistakable focus on the benefited class, . . . [not] simply as a ban on discriminatory conduct by recipients of federal funds." *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). Thus, Title IX's emphasis is on protecting individuals from discrimination, rather than on proscribing specific discriminatory practices by educational institutions.<sup>5</sup>

By its actions and its failures to act, the Board in the instant case violated the plain language of Title IX because it

---

<sup>5</sup> Moreover, it should be noted that under Title VII, even with its focus on proscribing particular employer practices, employers can be liable for sexual harassment, even when perpetrated by third parties—including co-workers and non-agents who are in an analogous position to student peers in the Title IX context. *See, e.g., Oncale v. Sundowner Offshore Serv.*, 118 S. Ct. 998 (1998) (applying the proscription against a hostile environment to one created by co-workers along with supervisors); *see also Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2289 (1998) (noting that Courts of appeals and district courts have "uniformly judg[ed] employer liability for co-worker harassment under a negligence standard".) 29 C.F.R. § 1604.11(d), (e) (EEOC Guideline stating that employers are responsible under Title VII for sexual harassment by co-workers and non-employees if the employer knew or should have known of the harassment, but failed to take prompt and appropriate remedial action).



allowed sexual harassment targeting LaShonda to persist. In so doing, it unquestionably "denied [her] the benefits of" and "subjected [her] to discrimination under" its education program. Moreover, the facts in this case point to an especially active role on the part of the school in fostering the sexual harassment and the resulting hostile environment suffered by LaShonda. Not only did school officials have actual knowledge of the harassment and exhibit deliberate indifference in refusing to address or remedy it, but also actually required LaShonda to sit next to the harasser, and prevented her and other students from complaining to the principal. Pet. App. at 96a-97a. Even the principal refused to take appropriate measures in response to the complaints of LaShonda and her mother, asking LaShonda why *she* was the only one complaining. *Id.* at 97a. The unmistakable message the school's conduct sent to LaShonda and to other students was that sexual harassment would go unpunished and undeterred. These actions, as well as the failures to act, were a direct cause of the hostile environment and the discrimination to which LaShonda was subjected, and form more than a sufficient basis for holding the Board responsible under Title IX.

## **2. Title IX's Legislative History Demonstrates Congress' Intent to Cover Peer Harassment.**

Title IX's legislative history demonstrates that its statutory protection is broad, encompassing student-to-student harassment. As chief sponsor Senator Birch Bayh noted, Title IX's role is to "provide for the women of America something that is rightfully theirs – an equal chance to attend schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they

will have a fair chance to secure the jobs of their choice with equal pay for equal work." 118 Cong. Rec. 5808 (1972).<sup>6</sup> This goal is thwarted if discrimination is allowed to persist in the classroom solely because the initial perpetrator of the sexual harassment is a fellow student.

Congress enacted Title IX following an effort to amend Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, to include "sex" as a protected class. As part of this effort, Congress heard a plethora of testimony concerning barriers facing women and girls in education. For example, witnesses detailed the ways in which full access to educational opportunities was denied female students, including by fellow students:

The institutional nature of sex discrimination in law schools also manifests itself in widespread attitudes toward women, which ultimately affect women adversely . . . For instance, when the students on law journals are mostly men . . . they usually pick male editors. This results . . . from the societal tendency to underrate the work of women. For instance, studies by psychologists have shown that students will consistently rate editors higher if told the authors are male, while the identical essays when attributed to female authorship are rated lower. This tendency to underrate has an obvious application to the case where a student choice of editors for the law journal is partly based on an evaluation of the quality of the other student's written work.

---

<sup>6</sup> The remarks of Senator Bayh, chief sponsor of Title IX, "are an authoritative guide to the statute's construction." *North Haven*, 456 U.S. at 527.

*Discrimination Against Women: Hearings on Section 805 of H.R. 16,098 before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor, 91st Cong., pt. 1, at 589 (1970) (statement of Mrs. Diane Blank and Mrs. Susan D. Ross, Women's Rights Comm. of New York Univ. L. Sch.).*

In order to ensure that female students no longer would be subjected to sex discrimination in education, and thus provide "women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women," 118 Cong. Rec. 5804 (1972) (remarks of Sen. Bayh), Congress enacted Title IX. The lawmakers envisioned and expected that Title IX would be both "strong and comprehensive." *Id.*<sup>7</sup>

In this connection, Congress broadly and purposefully proscribed "discrimination," in order to accomplish its objective of "providing individual citizens effective protection against [discriminatory] practices." *Cannon*, 441 U.S. at 704. Through such language, Congress intended that Title IX end the "corrosive and unjustified discrimination against women [by] reach[ing] into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales."

---

<sup>7</sup> It is hardly surprising that specific examples of peer sexual harassment were not mentioned in the legislative history, since sexual harassment itself was not recognized as a form of sex discrimination at that time. The first case to recognize this form of sex discrimination was *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) (interpreting Title VII). This Court did not address sexual harassment in the education context until 20 years after Title IX's enactment. *See Franklin*, 503 U.S. at 76 (establishing that school districts can be held liable under Title IX in cases involving a teacher's sexual harassment of a student).

118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh). Congress' stated goal was to provide, without limitation, "equal access for women and men students to the educational process and the extracurricular activities in a school." 117 Cong. Rec. 30,407 (1971) (remarks of Sen. Bayh). "The inescapable conclusion is that Congress intended that Title VI as well as its progeny—Title IX, Section 504, and the ADA—be given the broadest interpretation." S. Rep. No. 100-64, at 7 (1987).

Congress reaffirmed its goals regarding Title IX after the statute's implementing regulations were promulgated in 1975.<sup>8</sup> Specifically, Congress reviewed and ultimately approved the Title IX regulations, which include provisions that hold recipients responsible for benefits denied, or exclusion from participation, or for discrimination that occurs "under" their education programs and activities, even when the causative acts were committed by someone other than the recipient. *See North Haven*, 456 U.S. at 531-34 (relying on Congress' review and approval of employment regulations to hold that employment was intended to be covered by Title IX). In fact, the regulations contain a myriad of examples of discrimination by third parties for which recipients are held responsible.<sup>9</sup> Similarly, the

---

<sup>8</sup> The former Department of Health, Education and Welfare ("HEW") promulgated the regulations initially in 1975. HEW's functions under Title IX were transferred in 1979 to the Department of Education ("DOE"), which subsequently adopted the regulations without substantive changes. *See North Haven*, 456 U.S. at 515-17 & nn.4 & 5.

<sup>9</sup> *See, e.g.*, 34 C.F.R. § 106.31(d) (prohibiting sex discrimination in programs not operated by recipients); *id.* § 106.31(d)(2)(i) (requiring recipient to "develop and implement a procedure designed to assure" itself that an education program not operated by recipient does not discriminate against student or employee participants).



regulations also impose liability on recipients for significantly assisting any agency, organization or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees. 34 C.F.R. § 106.31(b)(6).<sup>10</sup>

In the House of Representatives, after HEW published its final Title IX regulations, *see* 40 Fed. Reg. 24,128 (1975), the Subcommittee on Postsecondary Education of the House Committee on Education and Labor held hearings to determine whether HEW's regulations were consistent with Title IX and its legislative history. *Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor*, 94th Cong. 1 (1975) [hereinafter *1975 Hearings*]. Witnesses testified regarding many of the aforementioned regulatory provisions, thus making Congress aware of HEW's interpretation of the statute and providing lawmakers with an opportunity to eliminate or alter these provisions from the final regulations. *See 1975 Hearings*, 212 (statement of Lillian Hatcher, Int'l Representative, UAW Women's Dep't regarding § 106.51(a)(3), prohibiting recipients from entering into any contractual or other relationship that directly or indirectly discriminates on the

---

<sup>10</sup> *See also id.* § 106.32(c) (requiring recipients that work with outside agencies to provide student housing to take reasonable action to ensure that such opportunities are provided in a non-discriminatory manner); *id.* § 106.37(a)(2) (prohibiting recipients from assisting any entity that provides financial assistance to its students in a manner that discriminates on the basis of sex); *id.* § 106.38(a) (prohibiting recipients from assisting any entity that discriminates on the basis of sex in making employment available to students); *id.* § 106.51(a)(3) (prohibiting recipients from entering into any contractual or other relationship that directly or indirectly discriminates on the basis of sex in employment in education).

basis of sex in education,); *id.* at 250, 252 (prepared statement of Am. Assoc. of Presidents of Indep. Colleges and Univs. (AAPICU) regarding §§ 106.32, 106.31 (d), and 106.37, respectively, which prohibit various forms of discrimination not perpetrated by recipients themselves); *id.* at 397 (statement of Dr. Bernice Sandler, Director, Project on the Status and Educ. of Women regarding § 106.31(b)(6), which prohibits recipients from "providing significant assistance" to any entity that discriminates based on sex).

Several members of Congress introduced resolutions or bills to disapprove of the 1975 regulations governing relationships between recipients of federal funding and third parties. Senator Helms introduced Senate Concurrent Resolution 46, which was identical to House Concurrent Resolution 310, which criticized the regulations governing housing, *see* 34 C.F.R. § 106.32, the regulations that prohibited recipients of funds from granting "significant assistance" to another person or entity that discriminated on the basis of sex, *see* 34 C.F.R. § 106.37(a)(2), and the regulations that govern employment assistance to students provided by non-recipients, *see* 34 C.F.R. § 106.38(a). *See* 121 Cong. Rec. 21,510-16 (1975). On the subject of prohibiting recipients of federal funds from providing "significant assistance" to another person or entity that discriminates, Senator Helms stated, "There is no basis for believing that Congress intended by the enactment of Title IX that the meaning of this term ["receiving" financial assistance] should be extended so as to indirectly encompass remote benefits to some program or activity separate from the educational program or activity to which the Federal financial assistance is given." *See* 121 Cong. Rec. 21,510 (1975) (Memorandum in support of Concurrent Resolution by Sen. Helms). Despite these concerns, Congress did not

restrict the scope of the regulations and they went into effect. *See North Haven*, 456 U.S. at 533 n.24; 121 Cong. Rec. 23,846 (1975).

After the final Title IX regulations went into effect, an amendment was offered to limit their scope in holding institutions liable for failure to remedy discrimination by third parties and non-agents of the institution. 122 Cong. Rec. 28,134 (1976) (Debate on the Education Amendments of 1976, Amendment proposed by Sen. McClure). This amendment attempted to limit severely Title IX's mandate against sex discrimination by defining "education program or activity" as "such programs or activities as curriculum or graduation requirements of the institutions." 122 Cong. Rec. at 28,136. Testimony in the debate cautioned against the broad application of Title IX to encompass discrimination not perpetrated directly by recipients. (Ex. A, Testimony by Dallin H. Oaks, president of Brigham Young University and a director and secretary of the AAPICU). Congress received testimony specifically criticizing the "unfairness" of requiring institutions to remedy discrimination carried out by "organizations outside their control," such as student teacher placements, housing providers and companies recruiting students for employment. 122 Cong. Rec. at 28,142. Congress rejected these proposals to limit the scope of Title IX, further indicating its intent to ensure that institutions address and remedy discriminatory acts occurring "under" their education programs or activities—whether carried out by employees, third-parties, or other non-agents. 122 Cong. Rec. at 28,148.

Congress subsequently has reaffirmed its intention to prohibit sex discrimination occurring "under" federally funded educational programs and has refused to adopt

provisions that would scale back the statute's scope and thus subvert its broad coverage.<sup>11</sup> For example, in response to restrictive interpretations of Title IX and similar statutes,<sup>12</sup> Congress enacted the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7, which abrogated the Eleventh Amendment immunity of the States from suit under Title IX. The 1986 statute strongly supports Congress' intent to ensure Title IX's broad application. Two years later, Congress enacted the Civil Rights Restoration Act, 20 U.S.C. § 1687, overruling the Supreme Court's decision that Title IX's proscription against sex discrimination was limited to the particular program receiving federal funds. *See Grove City College v. Bell*, 465 U.S. 555, 573-74 (1984). In this context, members of Congress repeatedly stated that Title IX was intended to require institutions to ensure that sex discrimination was not a part of any of their programs or activities. This view was informed by testimony that again highlighted the critical need to assure that recipients address the sex discrimination occurring "under" or in their programs or activities. Congress was aware of and intended to cover instances in which educational institutions turned their backs on sex discrimination targeting students—including those in which the initial discriminatory acts came from fellow students. One educator testified:

When the first six young women enrolled at Gompers [Vocational Technical High School] in 1977, the principal at that time sent them home that first day of

---

<sup>11</sup> As *Cannon* recognized, this Court would be "remiss if [it] ignored these authoritative expressions concerning the scope and purpose of Title IX and its place within the civil rights enforcement scheme." *Cannon*, 441 U.S. 686-87 n.7.

<sup>12</sup> *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).



school with the admonition: "You'd better transfer to another school. *I can't guarantee your safety here.*" I was appointed to admissions and engaged in a recruiting drive for young girls . . . It was a struggle to retain them.

*Joint Hearings before the Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary on H.R. 700 (The Civil Rights Restoration Act of 1985) 98th Cong. 27 (statement of Hilda Gore, Dir. of Admissions, Samuel Gompers Vocational Technical High School) (1985) (emphasis added) [hereinafter CRRA Hearings].* Congress heard other examples of student-to-student harassment, as well:

[T]he effort to remove sex discrimination from schools must continue because implementation and enforcement of the law has been, at best, sporadic. . . . [F]emale students enrolled in traditionally male schools report that they feel unwelcome and uncomfortable in traditionally male schools. Consider the following recent statements by female students:

After four years in the school, if a teacher asks me to go on an errand to a classroom in the basement, I never go alone. When I first came here, I was so frightened in the hallways that I always walked with my head down. I was constantly getting lost and arriving late to class.

As one female student said: "The boys try to run you

over until you get so tired you don't even want to come to school anymore." . . . There is still an urgent need for the Federal government to prohibit sex discrimination in schools.

*CRRA Hearings*, 93-94 (Statement of Rhoda Schulzinger, Staff Dir., Full Access Rights to Education). In light of these concerns that recipients address sex discrimination occurring under their programs, members of Congress recognized that "[t]he comprehensive impact of Title IX must be restored in education." 130 Cong. Rec. 9632 (1984) (remarks of Rep. Johnson).

The repeated, consistent expressions of Congress' intent that Title IX provide broad protection make clear that Title IX's scope encompasses, and was intended to encompass, student-to-student sexual harassment. To adopt the Eleventh Circuit's blanket rule, which plainly contradicts Title IX's language and legislative history, would mean that educational institutions could ignore the most egregious sexual assaults by students against students or allow male students to intimidate and harass female students until they dropped out of a physics or computer technology course, for example, and not be found in violation of Title IX. Such a result cannot be squared with the strong language and clear direction of the statute's legislative history.

**B. The Decision Below Ignores this Court's Precedents Which Support Title IX Coverage of Student-to-Student Sexual Harassment.**

Despite Title IX's broad language and legislative

history supporting the breadth of its terms, as well as this Court's interpretations of it, the Eleventh Circuit, joined by the Fifth Circuit, has concluded that Title IX's general prohibition against sex discrimination does not apply to an institution's failure to remedy or address student-to-student sexual harassment. These courts rely on their misinterpretations of the Spending Clause, and their mistaken assumptions about the application of agency principles to reach this conclusion.

The Eleventh Circuit foreclosed any Title IX coverage, and therefore any jurisdiction either for federal agency enforcement or private actions against educational institutions, based on its conclusion that recipients lacked the requisite notice under the Spending Clause that they could be liable for this form of sex discrimination. *Davis*, 120 F.3d at 1401. Agreeing with this general proposition, the Fifth Circuit allowed that schools might face liability, but only if they responded to complaints of female students differently than those of male students. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996). These decisions ignore this Court's precedents, in which the Spending Clause never has precluded coverage of sexual harassment under Title IX.

Both courts also distinguish teacher-to-student harassment, which this Court has found was covered by Title IX, from peer harassment, based on their assumption that school liability for teacher-student harassment is premised on the teacher's agency relationship with the school. *Davis*, 120 F.3d at 1401; *Rowinsky*, 80 F.3d at 1011. However, this Court has made clear that Title IX's obligation to ensure that individuals are neither "denied the benefits of," "excluded from participation in," or "subjected to discrimination under" federally funded education programs or activities is not based

on or restricted by agency principles. As this Court has recognized, sexual harassment can be a violation of Title IX, regardless of whether the perpetrator is an agent of the institution.

**1. *Gebser and Franklin Make Clear that the Spending Clause is No Bar to Title IX Coverage of Student-to-Student Sexual Harassment.***

Both *Davis* and *Rowinsky* draw the unfounded conclusion that Title IX does not apply to peer sexual harassment cases, based on their erroneous view of limitations emanating from the Spending Clause.<sup>13</sup> In this regard, the Eleventh Circuit opined, Title IX must "read like a prospectus and give funding recipients a clear signal of what they are buying." *Davis*, 120 F.3d at 1399. According to the Eleventh Circuit, because there is no explicit statutory language or legislative history addressing peer sexual

---

<sup>13</sup> In fact, while the Spending Clause authority fully supports Title IX coverage of peer harassment, Title IX also was enacted pursuant to Section 5 of the Fourteenth Amendment. See *Cannon*, 441 U.S. at 688 n.7, 704 (recounting Title IX's purposes and legislative history); *Doe v. University of Illinois*, 138 F.3d 653, 660 (7th Cir.), petition for cert. filed, 67 U.S.L.W. 3083 (July 13, 1998) ("[P]rohibiting arbitrary, discriminatory conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment") (internal citations omitted); *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); 118 Cong. Rec. 5982 (1972) (referring to Fourteenth Amendment as authority for Title IX); 131 Cong. Rec. 22,346 (1985) (invoking Fourteenth Amendment as authority for legislation to abrogate state immunity in actions under Title IX and related statutes); 132 Cong. Rec. 28,624 (1986) (same); see also *Griffin v. Breckenridge*, 403 U.S. 88, 107 (1971) (legislation may have more than one source of congressional power). However, as in *Franklin*, this Court need not decide all of Title IX's sources of authority to decide this case. *Franklin*, 503 U.S. at 75 n.8.



harassment *per se*, that clear signal is missing. Under *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981),<sup>14</sup> the Eleventh Circuit asserted statutes authorized by the Spending Clause must provide such explicit signals to provide adequate notice for recipients of federal funds.

That logic flies in the face of this Court's decisions in *Gebser* and *Franklin*. Both of these cases hold that Title IX covers a teacher's sexual harassment of a student despite the absence of specific language identifying such conduct in the statute's text and legislative history.<sup>15</sup> *Gebser*, like *Franklin*,

---

<sup>14</sup>At issue in *Pennhurst* was a provision of the Developmentally Disabled Assistance and Bill of Rights Act ("DDA"), 42 U.S.C. § 6001 *et seq.*: namely, a "bill of rights" that made specific findings regarding the rights of persons with disabilities. The Court held that this provision did not create any enforceable rights, based largely on the fact that it placed no clear obligations on states. See *Pennhurst*, 451 U.S. at 23. The Court concluded that this provision was "simply a general statement of findings and, as such, . . . too thin a reed to support the rights and obligations read into it by the court below." *Id.* at 19. In contrast, as discussed at length, *supra*, Title IX clearly requires federally funded institutions to ensure that individuals are not denied the benefits of, excluded from participation in, or subject to discrimination under their education programs or activities. See 20 U.S.C. § 1681(a).

<sup>15</sup> Even before *Gebser*, this Court had clarified that the "contractual nature" of Spending Clause statutes does not require a detailed list of every cause of action that may arise. *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). In that case, the State of Kentucky challenged the Department of Education's efforts to obtain repayment of funds granted pursuant to Title I of the Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27, 20 U.S.C. § 2701 *et seq.* The State argued that because Title I's requirements were ambiguous, it lacked the requisite notice that it could be held responsible for allegedly violating mandated assurances that Title I funds would not be used to supplant state and local monies designated for education programs. The Court rejected this argument, finding that the requirement was not ambiguous and explaining the nature of the contractual

clearly encompasses a cause of action for teacher-to-student sexual harassment; doing so was a necessary predicate for determining the standard for damages in such cases.<sup>16</sup> Thus,

---

relationship contemplated by the Spending Clause:

Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy. Title I, for example, involved multiple levels of government in a cooperative effort to use federal funds to support compensatory education for disadvantaged children. The Federal Government established general guidelines for the allocation and use of funds, and the States agreed to follow those guidelines in approving and monitoring specific projects developed and operated at the local level. Given the structure of the grant program, the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of the requirements of Title I.

*Id.* at 669. Title IX similarly represents Congress' effort to use federal funds to support the goal of eliminating sex discrimination in education. The statute's broad directive, its emphasis on protecting individuals, and Congress' stated objectives of ensuring that persons not be "excluded from participation in," "denied the benefits of," or "subjected to discrimination under" education programs, demonstrate that Congress specifically intended *not* to limit the scope of Title IX by articulating specifically each and every cause of action prohibited.

<sup>16</sup> In its effort to circumscribe the scope of Title IX, the Eleventh Circuit further suggests that teacher-to-student harassment may not be cognizable under the statute. See *Davis*, 120 F.3d at 1400 n.14 ("The Supreme Court's suggestion that teacher-student sexual harassment gives rise to a cause of action under Title IX was arguably dicta."). However, as this Court noted, "Federal courts cannot reach out to award remedies when the Constitution or laws of the United States do not support a cause of action." *Franklin*, 503 U.S. at 74. Thus, the fact that Title IX recognizes a cause of action for teacher-to-student harassment was integral to this Court's holding that all appropriate remedies are available under Title IX.

because the Spending Clause was not a bar to recognizing the availability of damages, it clearly did not preclude recognizing the underlying cause of action. In *Franklin*, the Court specifically rejected the argument that money damages should not be available under Title IX because of the limitations imposed on Spending Clause legislation, holding that all appropriate relief, including damages, is available under Title IX.

As *Gebser* and *Franklin* make clear, Title IX's general prohibition of gender-based discrimination under a Title IX recipient's program is fully sufficient for Spending Clause purposes. In addition, given the fact that the basis for liability in such cases, as described below, is the recipient's failure to address the harassment—that is, its failure to ensure that individuals are not denied the benefits of, excluded from participation in, or subjected to discrimination under its education program—these decisions further support coverage of student-to-student harassment under Title IX.

**2. *Gebser* Makes Clear that Educational Institutions May be Held Liable under Title IX for Their Own Response to Sexually Hostile Environments, Whether Created by Teachers or Students.**

The Eleventh Circuit erroneously concluded that teacher-to-student harassment is distinguishable from peer harassment because teachers are agents of the school, while students are not. *Davis*, 120 F.3d at 1401; *see also Rowinsky*, 80 F.3d at 1012-13. However, as this Court's decision in *Gebser* makes plain, institutional liability for sexual harassment under Title IX is not limited to actions arising from agents alone.

*Gebser* holds that educational institutions may be subject to damages liability for failing to remedy teacher-to-student sexual harassment when a school official "with authority to take corrective action to end the discrimination" knew of the harassment and responded to it with deliberate indifference. *Gebser*, 118 S. Ct. at 1999. In articulating this standard, the Court considered and rejected the use of agency principles to hold a recipient liable in damages for the conduct of the harasser—the very standard used by the Eleventh and Fifth Circuits to distinguish peer harassment from teacher-student claims. *Compare Davis*, 120 F.3d at 1401 ("The present complaint . . . does not allege that a school employee discriminated against LaShonda . . . . The complaint alleges that [school officials] failed to take measures sufficient to prevent a non-employee from discriminating against LaShonda."), *with Gebser*, 118 S. Ct. at 1996 ("Title IX contains no . . . reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles.") The Court held that liability for damages was based on the educational institution's official decision not to remedy the discrimination, rather than on the identity or agency relationship (if any) of the harasser to the school.

That the Court in *Gebser* did not rely upon an agency relationship as necessary for the recovery of damages, in light of the Court's concern that schools not be subjected to unlimited financial liability, is particularly telling. Under *Gebser*, damages are available under circumstances that are narrower than those leading to Title IX coverage for agency enforcement or for equitable relief. For example, *Gebser* left unaltered the Department of Education's ("DOE") standards for enforcing Title IX's proscription against sexual harassment, even though they are less stringent than those



required for damages.<sup>17</sup> Under DOE standards, educational institutions are liable if they knew or should have known of peer hostile environment sexual harassment, but failed to take prompt, remedial action. See *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,042 (Mar. 13, 1997) [hereinafter *Sexual Harassment Guidance*].<sup>18</sup>

Further, *Gebser* repeatedly articulates the differences between damages and equitable relief in private actions or agency enforcement proceedings. For example, in analyzing the question of the damages standard before it, this Court stated that petitioners “sought not to establish a Title IX violation but also to recover damages”. 118 S. Ct. at 1996. In explaining why damages could be considered separately from other remedies, the Court noted that when Title IX was enacted in 1972, Title VII only allowed injunctive and equitable relief, not monetary damages. *Id.* at 1997. The

---

<sup>17</sup> Indeed, the defendant school district in *Gebser* conceded that injunctive relief may be available under Title IX even when damages are not:

[T]he district could certainly be held “responsible” in the sense that it could be ordered to remedy the situation by firing the offending teacher, adopting new policies, enforcing existing policies, or taking other appropriate remedial action.

Brief for Respondent Lago Vista at 13, *Gebser*, 118 S. Ct. 1989 (No. 96-1866).

<sup>18</sup> Following the *Gebser* decision, the DOE sent a letter of clarification to school superintendents nationwide, stating that “the obligations of schools that receive federal funds to address instances of sexual harassment have not changed as a result of the Supreme Court decision.” Letter from Richard W. Riley, Secretary of Educ., Aug. 28, 1998 (Attached as App. A).

Court expressed concern that an award of damages in a particular action, in contrast to other remedies, could exceed the amount of federal funds received by the school. *Id.* at 1999.

Accordingly, given the Court’s concerns about damages remedies, the fact that agency principles did not form a predicate for damages demonstrates that an agency relationship between the harasser and the school can hardly be a predicate for a violation of Title IX and for the imposition of non-damages relief. Thus, when a recipient turns its back on sexual harassment—whether by a teacher or a student—and allows an individual to be “subjected to” discrimination or otherwise “excluded from participation” in its programs because of the misconduct, the institution must be held liable for a violation of Title IX.

This conclusion is only underscored by the Court’s Title VII precedents, the principles of which may apply in determining whether sexual harassment is sex discrimination under Title IX. *Gebser*, 118 S. Ct. at 1995. Even under Title VII’s statutory scheme, which is more focused on the specific actions of the employer, in contrast to Title IX’s focus on the elimination of discrimination from whatever its source, the identity of the harasser is not the touchstone for determining whether such discrimination has occurred. Rather, the appropriate inquiry, as this Court has clarified time and again, focuses on the nature of the conduct and the response of the entity—whether the harasser is a peer or a supervisor. See, e.g., *Oncale*, 118 S. Ct. at 1001 (noting in a peer and supervisor harassment context that “when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated”) (citation and

internal quotation marks omitted).

Under the plain language of the statute, and this Court's interpretation of it, such misconduct clearly violates Title IX. There simply is no principled basis for the Fifth and Eleventh Circuit's conclusion that Title IX requires educational institutions to address sexual harassment of a student by a teacher, but not by another student.

Accordingly, because, in the instant case, the Board violated its obligation not to "subject" LaShonda to discrimination or "deny" her the benefits of the education it provided when it refused to remedy repeated instances of discrimination, Mrs. Davis has stated a claim under Title IX.

## **II. THE DEPARTMENT OF EDUCATION RECOGNIZES THAT STUDENT-TO-STUDENT SEXUAL HARASSMENT IS COVERED UNDER TITLE IX.**

The Department of Education consistently has required recipients to remedy sex discrimination emanating from third parties, including students, in their programs. This interpretation of the statute, as reflected in DOE's regulations, discussed *supra* in Section I.A.2, policy statements, and enforcement actions is consistent with the broad language of Title IX and Congress' intent; therefore, it is entitled to great deference. See *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *North Haven*, 456 U.S. at 522 n.12.

### **A. The Department of Education's Policy Guidance Covers Peer Hostile Environment Sexual Harassment.**

The Department of Education's Office for Civil Rights (OCR) consistently has imposed an obligation on

recipients to take appropriate action to remedy discriminatory harassment, including sexual harassment of which they knew or should have known. OCR has issued extensive policy guidance on sexual harassment in general, reflecting OCR's interpretations that have been in place for many years. See *Sexual Harassment Guidance*. The Sexual Harassment Guidance specifically addresses student-to-student harassment and "reflects longstanding OCR policy and practice" that sexual harassment of students by other students violates Title IX. 62 Fed. Reg. at 12,035. As OCR explains, this "policy and practice is consistent with Congress' goal in enacting Title IX—the elimination of sex-based discrimination in federally assisted education programs." *Id.* at 12,034.

According to the Sexual Harassment Guidance, a school may be found in violation of Title IX for peer sexual harassment if: "(i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action." *Id.* at 12,039.<sup>19</sup> A recipient's failure to respond to known sexual harassment "permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX." *Id.* Accordingly, the Department finds recipients in violation of the statute in such instances because they have failed to

---

<sup>19</sup> Actual notice occurs when "an agent or responsible employee" receives notice. 62 Fed. Reg. at 12,042. The Preamble to the Guidance cautions that providing a list of personnel to whom notice could be given would be "inappropriate" as it will depend on a variety of factors, including "the authority actually given to the employee and the age of the student." *Id.* at 12,036-37. Constructive notice occurs when the harassment is "widespread, openly practiced, or well-known to students and staff." *Id.* at 12,042.



fulfill their obligation under Title IX to ensure that students are not subjected to sex discrimination. A recipient fulfills this obligation when it acts "immediately and appropriately to eliminate harassment of which it has notice and to prevent its recurrence." *Id.* at 12,037. OCR's policy stating that an institution may be out of compliance with Title IX for failure to remedy peer sexual harassment is consistent with Title IX's mandate and Congress' intent and with its enforcement actions.

**B. The Department's Enforcement Actions Have Long Required Recipients to Remedy Sexually Hostile Environments Created by Students.**

OCR's enforcement actions under Title IX consistently have imposed liability on recipients that fail to take appropriate action to end peer sexual harassment of which they knew or should have known. *See, e.g.*, Letter of Findings by Kenneth A. Mines, Reg'l Civil Rights Dir., Region V (Apr. 23, 1993), Docket No. 05-92-1174; Letter of Findings by John E. Palomino, Reg'l Civil Rights Dir., Region IV (July 24, 1992), Docket No. 09-92-6002; Letter of Findings by John E. Palomino, Regional Civil Rights Dir., Region IX (May 5, 1989), Docket No. 09-89-1050 (Attached as App. B).

These Letters of Finding are entitled to deference from the Court because they are consistent with Title IX and its legislative history and thus represent well-established practice by the agency charged with enforcing Title IX. *Smiley v. Citibank*, 517 U.S. 735, 740 (1996); *Georgia Dep't of Med. Assistance v. Shalala*, 8 F.3d 1565, 1567 n.8 (11th Cir. 1993) (citing *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992)); *Patricia H. v.*

*Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1291 n.3 (N.D. Cal. 1993) (citing OCR Letters of Findings); *see also Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) (citing OCR Letter of Finding in Title IX athletics case); *Garrett v. Board of Educ.*, 775 F. Supp. 1004, 1009-10 & n.9 (E.D. Mich. 1991) (deferring to OCR rulings interpreting Title IX to prohibit all-male public elementary and secondary school programs).

As an established practice that is grounded firmly in Title IX's language, its legislative history, and relevant Supreme Court precedent, DOE's interpretation that Title IX covers peer harassment is entitled to substantial deference.

**C. The Department's Interpretation of Title VI Further Supports Its Application of Title IX to Peer Sexual Harassment.**

Because of the similarities of Title IX and Title VI, as well as their respective enforcement schemes, Title VI provides useful guidance in determining the scope of Title IX in reaching peer sexual harassment. *See Cannon*, 441 U.S. at 694-95 (stating that "Title IX was patterned after Title VI of the Civil Rights Act of 1964" and that the "two statutes use identical language to describe the benefited class"); *id.* at 688 n.7 (stating that both statutes form a significant "part of the civil rights enforcement scheme" that Congress has enacted pursuant to its "obligation to enforce the 14th amendment by eliminating entirely . . . discrimination") (quoting 122 Cong. Rec. 31,372 (1976) (remarks of Sen. Kennedy)). Consistent with its view of Title IX, the Department has interpreted Title VI to require recipients to take corrective action once they have notice of a racially hostile environment created by students.

Like the Title IX regulations, Title VI's regulatory prohibition of discrimination on the basis of race, color, or national origin extends to discrimination that occurs under the recipient's program even if it is not perpetrated by the recipient in the first instance. *See* 34 C.F.R. § 100.3(c) (concerning discrimination resulting from contractual arrangements); *see also id.* at Pt. 100, App. B(IV), (VI), & (VII) (guidelines to the regulations requiring recipients to ensure that students enrolled in job placement programs are not subjected to discrimination on the basis of race, color, or national origin and to obtain written assurances that sponsors will not discriminate).

Consistent with its broad regulatory authority, the Department of Education announced in 1994 that it would hold educational institutions responsible under Title VI for failing to remedy hostile environment racial harassment caused by students. In its 1994 Investigative Guidance, the Department stated that "[a] recipient [of federal funds] has subjected an individual to different treatment on the basis of race if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice." *See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448, 11,449 (1994) [hereinafter *Title VI Investigative Guidance*]. This obligation encompasses peer racial harassment. As the Investigative Guidance explains, the "alleged harasser need not be an agent or employee of the recipient, because this theory of liability under Title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment." *See id.*

In a recent opinion, the Ninth Circuit applied this Investigative Guidance to uphold allegations of peer racial

harassment as sufficient to state a cause of action under Title VI. *See Monteiro v. Tempe Union High Sch. Dist.*, No. 97-15511, 1998 WL 727338, at \*10 (9th Cir. Oct. 19, 1998). In this case, the plaintiff, the mother of an African-American student, claimed that white students had called her daughter and other black students "nigger," verbally and through graffiti, and that even after the students and their parents complained, school authorities did nothing to address the white students' behavior. *See id.*

The court had no difficulty recognizing why such conduct violated the statute's non-discrimination mandate:

[B]eing referred to by one's peers by the most noxious racial epithet in the contemporary American lexicon, being shamed and humiliated on the basis of one's race, and having the school authorities ignore or reject one's complaints would adversely affect a Black child's ability to obtain the same benefit from schooling as her white counterparts.

*Id.* This recognition is equally appropriate where the harmful conduct targets a student because of her sex and school officials refuse to address it.<sup>20</sup>

---

<sup>20</sup> Section 504 of the Rehabilitation Act of 1973 (codified as amended at 29 U.S.C. § 794), has been held to prohibit hostile environment discrimination based on disability. This prohibition encompasses instances where a non-agent or third-party carries out the harassment, and the recipient knew or should have known of the harassment, but failed to take remedial steps. *See, e.g., Kent v. Derwinski*, 790 F. Supp. 1032, 1040 (E.D. Wash. 1991) (employer in violation of § 504 where Veterans Administration's efforts to remedy "taunting and ridicule" of mentally retarded employee by co-workers



In finding that the plaintiff could state a claim under Title VI, the Ninth Circuit considered the three-part test stated in the Investigative Guidance in determining a violation, and then applied this Court's decision in *Gebser* to conclude that a damages remedy would lie for such a violation. The Investigative Guidance requires the following showing to establish a Title VI violation: (1) the existence of a hostile racial environment, defined as one in which "severe, pervasive or persistent" racial harassment has occurred; (2) actual or constructive notice to the recipient of federal funds; and (3) the recipient's failure to "respond adequately to redress the racially hostile environment." See *Title VI Investigative Guidance*, 59 Fed. Reg. at 11,449. By applying this test to the facts alleged by the plaintiff in *Monteiro*, the Ninth Circuit found that she could state a claim for a violation of Title VI. See *Monteiro*, 1998 WL 727338, at \*11. The court then used the *Gebser* test to state that a school district could be liable for damages under Title VI if it was "deliberately indifferent" to its students' right to a learning environment free of racial hostility and discrimination." See *id.* (quoting *Gebser*, 118 S.Ct. at 1999).

This Court has recognized that Title VI was enacted because of Congress' concern "with the lack of progress in school desegregation." *Green v. County Sch. Bd.*, 391 U.S. 430, 435 n.2 (1968). Shortly after the enactment of Title VI in 1964, courts handled a range of issues relating to the progress of desegregation, including peer racial harassment.

---

were untimely and inadequate, resulting in constructive discharge); see also *Taylor v. Garrett*, 820 F. Supp. 933, 940 n.11 ("[I]t is strongly arguable . . . that disability-based harassment responsible for creating an abusive working environment is itself actionable under the Rehabilitation Act.") (citing *Pendleton v. Jefferson Local Sch. Dist. Bd. of Educ.*, 958 F.2d 372 (6th Cir. 1992) (table)).

Recognizing that school officials must take steps to prevent student-to-student racial harassment in order to actualize desegregation, the Fifth Circuit entered a model desegregation decree which provided in relevant part:

Within their authority school officials are responsible for the protection of persons exercising rights under or otherwise affected by this decree. They shall, without delay, take appropriate action with regard to any student or staff member who interferes with the successful operation of the plan. Such interference shall include harassment, intimidation, threats, hostile words or acts, and similar behavior.

*United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 392 (5th Cir. 1967); see also *Stell v. Board of Pub. Educ.*, 387 F.2d 486, 495 (5th Cir. 1967) (same); *Coppedge v. Franklin County Bd. of Educ.*, 273 F. Supp. 289, 299 (E.D.N.C. 1967), *aff'd*, 394 F.2d 410 (4th Cir. 1968). (same); *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala.) (same), *aff'd sub nom. Wallace v. United States*, 389, U.S. 215 (1967).

In *Moses v. Washington Parish School Board*, 302 F.Supp. 362 (E.D. La. 1969), the court very specifically focused on the school's responsibility for destructive student behavior:

In accordance with the Order of this court of October 19, 1967, all appropriate measures shall be promptly and firmly taken at all times to discourage, suppress, discipline, and otherwise punish physical abuses, retaliation, harassment, name-calling, and similar treatment of pupils of either race by pupils of another race on a racial basis.

*Id.* at 367. See also *Bowman v. County Sch. Bd.*, 382 F.2d 326 (4th Cir. 1967) (Sobeloff, J., concurring) ("In some school districts in the South, school officials have failed to prevent or punish harassment by white children who have elected to attend white schools.") (quoting U.S. Comm'n on Civil Rights, *Survey of School Desegregation in the Southern and Border States*, 1965-66, at 51 (1966)).

The fact that in the wake of Title VI peer harassment was addressed in desegregation orders, and that this was so before Title IX was passed, strongly militates in favor of recognizing this cause of action under Title IX, particularly since Congress explicitly modeled the statute on Title VI. See *Cannon*, 441 U.S. at 695.

### III. PETITIONER HAS STATED A CLAIM FOR RELIEF UNDER TITLE IX.

Petitioner Davis has stated a claim for damages and equitable relief under Title IX. With respect to her damages claim, as discussed above, this Court held in *Gebser* that damages are available for sexual harassment when a school official with authority to institute corrective measures had actual knowledge of the harassment and responded to it with "deliberate indifference." *Gebser*, 118 S. Ct. at 1999-2000. The facts of the instant case easily fit into the framework established in *Gebser* for recovery of damages.

First, there is no doubt that a school official with authority to institute corrective action had actual notice of the sexual harassment. As discussed *supra*, over a period of five months, LaShonda and Mrs. Davis provided notice of the sexual harassment to persons with the authority to act on behalf of the Board with respect to G.F.'s conduct. Pet. App. at 96a-97a. Specifically, after each instance of sexual

harassment LaShonda, Mrs. Davis, or both complained to the appropriate teachers. *Id.* By May 1993, after no response was forthcoming from the school, Mrs. Davis directly contacted Principal Querry, who, according to classroom teacher Mrs. Fort had been notified five months earlier. *Id.* Thus, there is no question that Respondents had actual notice of the sexual harassment.

Second, the Board responded with deliberate indifference to the sexual harassment. Under this standard, Petitioner must show that a "municipal actor disregarded a known or obvious consequence of his action." *Board of Comm'rs v. Brown*, 117 S. Ct. 1382, 1391 (1997); *Canton v. Harris*, 489 U.S. 378, 388 (1989).<sup>21</sup> In applying this standard to a Title VI case involving student-to-student racial harassment, the Ninth Circuit recently found that a school board is "liable for its failure to act if the need for intervention was so obvious, or if inaction was so likely to result in discrimination, that 'it can be said to have been

---

<sup>21</sup> In *Board of Commissioners v. Brown*, which involved a § 1983 claim based on a sheriff's decision to hire a deputy who used excessive force, the Court found:

Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federal right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."

117 S. Ct. at 1385. In the instant case, had "adequate scrutiny" been accorded the repeated complaints by LaShonda and her mother, a "reasonable" school official would have concluded that a consequence of ignoring the harassment would be the deprivation of LaShonda's right to not be "subjected to discrimination under" the education program provided by the Board.



deliberately indifferent to the need.” *Monteiro*, 1998 WL 727338, at \*11 (holding that a cause of action for peer racial harassment exists under Title VI and quoting *Canton*, 489 U.S. at 388-92).

In the instant case, the need for intervention by school officials was obvious, yet the officials failed to exercise their authority to address the harassment. Despite the fact that LaShonda and her mother complained about G.F.’s five-month campaign of pervasive harassment targeting LaShonda, and repeatedly sought assistance from school officials, their pleas for help were ignored or thwarted. For example, Mrs. Fort refused for over three months to allow LaShonda the simple remedy of a new seating assignment away from G.F. Pet. App. at 97a. Mrs. Fort also intercepted LaShonda’s attempts to speak to the principal directly by stating “[i]f he wants you, he’ll call you.” *Id.* at 96a. When Mrs. Davis urged Principal Querry to intervene, he responded by asking LaShonda “why she was the only one complaining.” *Id.* at 97a.

This conduct permitted a sexually hostile environment to flourish, affecting LaShonda’s ability to benefit from the education the Board provided, as evidenced by her declining academic performance, and harming her emotional and mental well-being, as evidenced by the suicide note she authored. *Id.* The Board’s repeated refusals to act in the face of certain harm to this fifth-grade student evince its deliberate indifference to LaShonda’s plight. See *Morse v. Regents of Univ. of Colo.*, 154 F.3d 1124, 1128 (10th Cir. 1998) (concluding that plaintiff had stated a damages claim for peer harassment under Title IX where complaint alleged actual knowledge and failure to take any remedial action on part of school officials). Indeed, the fact that school officials outright refused to remedy the situation—by requiring her to

sit next to G.F. for over three months and thwarting her attempts to complain directly to the principal—indicate that the Board’s response exceeded the deliberate indifference standard.

Given the posture of this case, Mrs. Davis has more than adequately alleged sufficient facts to state a claim for damages under Title IX. Based on the lower standard for non-damages relief,<sup>22</sup> Mrs. Davis’ claim for equitable relief<sup>23</sup> must also stand. Equitable relief, including an order to implement a sexual harassment policy and to refrain from discriminating against female students by failing to respond to complaints of sexual harassment, is particularly important in cases such as this one to ensure that institutions take the necessary steps to eliminate the discrimination. Otherwise, sexual harassment could continue in violation of the statute. This Court should reverse the Eleventh Circuit’s decision,

---

<sup>22</sup> See *infra* at I.B.2.

<sup>23</sup> Mrs. Davis’ complaint prays for, *inter alia*, an order requiring respondent to implement a sexual harassment policy and enjoining the district from discriminating against female students by failing to respond to complaints of sexual harassment. Pet. App. at 102a.

remand the case, and permit the Petitioner to proceed with her cause of action.

### CONCLUSION

For the foregoing reasons, Petitioner urges this Court to reverse the Eleventh Circuit's decision and remand the case.

Respectfully submitted,

Deborah L. Brake  
Professor of Law  
University of Pittsburgh  
School of Law  
3900 Forbes Avenue  
Room 322  
Pittsburgh, PA 15260

Nancy Perkins  
Stevenson Munro  
Arnold & Porter  
555 12th Street, N.W.  
Washington, D.C. 20004

*Of Counsel*

Marcia D. Greenberger  
Verna L. Williams\*  
Leslie T. Annexstein  
Neena K. Chaudhry  
National Women's Law Center  
11 Dupont Circle, N.W.  
Washington, D.C. 20036  
(202) 588-5180

*Attorneys for Petitioner*

\*Counsel of Record



## **APPENDICES**

## APPENDIX A

THE SECRETARY OF EDUCATION  
WASHINGTON, D.C. 20202

August 28, 1998

An important shared goal of educators throughout our country is to ensure that students have a safe and secure environment that is conducive to learning and that affords students equal educational opportunities regardless of their sex. School districts have a critical responsibility for preventing and eliminating sexual harassment discrimination. Sexual harassment of a student, if not appropriately addressed, can have serious, detrimental consequences for the student that impedes the student's education, and constitutes a breach of trust between the school and the student and family.

A recent Supreme Court decision took notice of the "extraordinary harm" that a student suffers when subjected to sexual harassment and abuse by a teacher. The Court emphasized that such conduct by a teacher "undermines the basic purposes of the educational system." Gebser v. Lago Vista Independent School District (June 22, 1998). The Gebser decision limited the availability of damages to a student in a private Title IX lawsuit against a school district. It did not, however, alter the fundamental obligations of schools and their employees to take prompt action to address instances of sexual harassment. This letter summarizes existing obligations and the effect of the Supreme Court decision.

### **Title IX Prohibits Sexual Harassment Discrimination**

The Department of Education's Office for Civil Rights (OCR), which has the responsibility for enforcing Title IX, recently provided educational institutions with a detailed discussion of their responsibilities to prevent and, when it



occurs, remedy sexual harassment of students. A copy of the guidance is available on the Department's web site at <http://www.ed.gov/offices/OCR/sexhar00.html>.

Title IX prohibits sex-based discrimination in education programs and activities operated by schools that receive federal financial assistance. Therefore, school districts are responsible under Title IX to provide students with a nondiscriminatory educational environment. As described in the guidance, sexual harassment of a student may violate this obligation. When a responsible school employee, such as a principal or teacher, learns of possible sexual harassment discrimination by others, Title IX requires the school to immediately investigate, to take appropriate steps to end the harassment, to eliminate the effects of the harassment, and to prevent the harassment from recurring.

The Department's Title IX regulation also requires schools to have well-publicized policies against discrimination based on sex, including sexual harassment discrimination; to have effective and well-publicized procedures for students and their families to raise and resolve these issues; and to take prompt and effective action to equitably resolve sexual harassment discrimination complaints. 34 CFR Part 106.8. In addition, each school district is required to designate at least one employee to coordinate and carry out its Title IX responsibilities. *Id.* I encourage you, at the outset of the new school year, to publicize and reaffirm these policies and procedures to returning and new members of the school community, including teachers, counselors, administrators, parents, and students.

#### **The Gebser Decision Addresses Private Damages Claims**

The Court's recent decision in *Gebser* was limited to private Title IX lawsuits for money damages. The Court in *Gebser* ruled that a private plaintiff in a court action can obtain money damages against a school district under Title IX if a school official who has the authority to take corrective action

has actual notice of sexual harassment and is deliberately indifferent to it. The *Gebser* decision expressly distinguished the limits on private recovery of money damages from the Department of Education's enforcement of Title IX. Thus, the obligations of schools that receive federal funds to address instances of sexual harassment have not changed as a result of the Supreme Court decision. School districts must continue to take reasonable steps to prevent and eliminate sexual harassment discrimination. In addition, pursuant to its published guidance, OCR will continue to enforce Title IX in this area, including by investigating complaints alleging sexual harassment discrimination.

#### **OCR Offers Technical Assistance**

Sexual harassment discrimination can have serious, detrimental consequences for students. Thus, school districts need to take the problem of sexual harassment very seriously. In addition to having well-publicized policies and procedures in place, schools should be taking preventative steps to identify problems -- such as training staff to recognize and report potential harassment -- and to follow up on any information indicating potential discrimination. OCR welcomes the opportunity to provide individual schools upon request with technical assistance and practical guidance to develop preventative programs.

The Department is committed to continuing our leadership role in ensuring equal educational opportunities for all students. The Department will continue to work with schools, parents and other interested parties to ensure that schools have effective policies and procedures in place to prevent sexual harassment. I have attached a contact list for OCR's regional offices for your convenience.

Thank you for your interest in this critical issue.

Yours sincerely,

Enclosure

Richard W. Riley

APPENDIX B

(1)

UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS-REGION V  
401 SOUTH STATE STREET-7TH. FLOOR  
CHICAGO, ILLINOIS 60605-1202

OFFICE OF THE  
DIRECTOR

APR 27, 1993

Dr. Gerald L. McCoy  
Superintendent  
Eden Prairie Schools, District #272  
8100 School Road  
Eden Prairie, Minnesota 55344-2292

Re: 05-92-1174

Dear Dr. McCoy:

The Office for Civil Rights (OCR), U.S. Department of Education, has completed its investigation of the above-referenced complaint you (hereinafter the "complainant") filed on September 23, 1992, against Eden Prairie Schools, District #272 (district). The complainant alleged that the district has failed to address adequately incidents of sexual harassment against her daughter (also referred to as student A) and other female elementary, intermediate, and middle school students on the basis of sex in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.

OCR is responsible for enforcing Title IX and its implementing regulation at 34 C.F.R. Part 106 which prohibit discrimination on the basis of sex in education programs and activities receiving Federal financial



assistance. The district receives funding from the U.S. Department of Education and is, therefore, subject to these provisions.

On the basis of evidence submitted by both the complainant and the district and testimony provided by witnesses, OCR has determined that the district violated Title IX and its implementing regulation at §§106.31 (b) (1-4) and (7), in that it failed to take timely and effective responsive action to address sexual harassment which denied female students, because of their sex, equal educational services, with respect to the issues raised by this investigation. The district, however, voluntarily entered into a settlement agreement to resolve the violation cited above. The basis for OCR's determination is summarized below.

#### REGULATORY AUTHORITY

The regulation implementing Title IX at 34 C.F.R. §106.31(b) prohibits discrimination on the basis of sex in the provision or the enjoyment of any aid, benefit, or services offered in the educational programs and activities operated by the recipient. The Title IX regulation at 34 C.F.R. §§106.31(b) (1) through (4) and (7) prohibits harassment that, on the basis of sex, results in a denial or limitation of any aid, benefit or service. Sexual harassment is defined as verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or student, which is unwelcome, hostile, or intimidating.

Under Title IX and its implementing regulation, a recipient is directly responsible for the discriminatory acts of its employees. A recipient also violates Title IX when it knew or should have known that a sexually hostile environment exists due to student-to-student harassment and fails to take timely and effective corrective action. A sexually hostile environment is created by acts of sexual nature that are sufficiently severe or pervasive to impair the educational

benefits offered by the recipient. The existence of a sexually hostile environment is determined from the viewpoint of a reasonable person in the victim's situation. In determining whether sexual harassment exposes students because of their sex to a hostile environment, relevant circumstances include the age of the victim(s); the frequency, duration, repetition, location, severity, and scope of the act(s) of harassment; the nature and context of the incident(s); whether the conduct was verbal or physical; whether others joined in perpetuating the alleged harassment; whether the harassment was directed at more than one person; and whether the alleged incidents created an offensive, hostile or abusive atmosphere at the district or at specific schools or in other district settings, such as school buses.

#### FACTS

As of April 1991, the district had a formal policy prohibiting sexual harassment of students and employees. Under the procedures stated in the policy, the principal of each school is responsible for handling all reports of student-to-student sexual harassment pursuant to the Code of Student Conduct (Code). As amended in March 1992, the Code contains corresponding provisions for handling student-to-student sexual harassment. Pursuant to these provisions, reports of sexual harassment are to be forwarded in writing to the executive director of personnel (director of personnel), the school official designated to coordinate the district's sexual harassment policy. The principal or designee is to conduct an investigation which may include contacts with the parents of all of the students involved and interviews with the parents of all of the students involved and interviews with the individuals identified as having possible information about the incident. Possible responses to a completed investigation include disciplinary sanctions, requiring an apology, provision of social work services, recommendations to protect the victim, staff, or other students, and a combination of these or other appropriate actions. District

records indicate that these procedures were applied on a number of occasions in 1989-90 and 1991-92; no incidents were reported in 1990-91.

The policy defines sexual harassment, *inter alia*, as inappropriate verbal or physical contact of a sexual nature, including verbal harassment or abuse, which has the purpose or effect of interfering with an individual's education or creating an intimidating, hostile, or offensive environment. When questioned by OCR in November of 1992, district personnel acknowledged that in prior years they considered the district's sexual harassment policy to apply to student-to-student interactions that involved only overt displays of sexual aggression or unwelcome solicitation, particularly physical contact. Other incidents of offensive sexual language and behavior, particularly those involving preadolescent students, were treated as disciplinary infractions under the category of "inappropriate behavior or language."

OCR's investigation identified several major instances in which student-to-student sexual harassment was brought to the district's attention during the 1991-92 school year. Student A, who was six years of age during 1991-92, attended Cedar Ridge Elementary School. On March 9, 1992, the complainant telephoned the district's transportation department to complain about foul language being used by students on her daughter's bus in January and February 1992. The examples given at this time were not overtly sexual. The complainant identified three boys (students 1, 2, and 3) as the primary perpetrators. Students 1 and 2 were nine years old at the time; student 3 was six years old.

The coordinator of the transportation department (coordinator) responded to the March 9 telephone call by riding the morning and afternoon buses on March 10. He did not hear profanity but observed disruptive behavior. The bus drivers reported that although they were unaware of foul

language, they could not hear beyond the first few rows of seats.

During his afternoon ride the coordinator talked to a number of students who told him that some children swore and named students 2 and 3, and possibly others. The coordinator warned all students that discipline would be imposed for swearing and admonished those children who had been singled out by others. He also informed the principal of Cedar Ridge about the alleged foul language and misbehavior by students he observed. The coordinator stated that he did not interview the complainant's daughter as he viewed the complaint as general in nature. The coordinator indicated that he telephoned the complainant at the end of the day to discuss his observations.

The complainant informed OCR that in her March 10 telephone conversation with the coordinator she identified two other fourth grade boys as involved; the coordinator told OCR he could not remember whether the complainant had mentioned any students other than students 1, 2, and 3 as responsible for the foul language.

On March 10, the coordinator also called the Cedar Ridge principal to report the complainant's concerns and his own observation after riding the bus. The principal indicated that she had just assigned student 1 a one-day suspension and student 2 a one-hour detention for disruptive behavior of a nonsexual nature reported by the afternoon driver on discipline slips on March 9. Both boys had been written up many times since the beginning of the year for disruptive behavior and rules violations. On or about March 10, the principal also talked with student 3 and another boy who she said has also been mentioned as a troublemaker about the need for appropriate language. The latter student is not one mentioned to the coordinator during the telephone call.



On March 18, 1992, the complainant wrote to the coordinator describing specific incidents of explicit sexual and abusive language and conduct on her daughter's bus. In one instance, her daughter and another female student were chased off the bus by a male first-grade student who called them a derogatory sex-related name. The complainant reported that the girls were screaming and in tears. This incident was witnessed by the complainant's day care provider who told OCR that the girls were hysterical. According to the complainant's letter, the same boy also teased the two girls about their sex organs. The complainant further stated that within the last week student A had reported to her the latest expletive used by boys on the bus and that one of the boys had told her daughter in graphic slang terms to perform sex acts with her father. Although the letter does not use the term sexual harassment, it is apparent that the complainant was concerned about the effect the constant exposure to such language and behavior would have on her daughter.

The complainant again wrote to the coordinator on April 27, May 8, and May 26, 1992. Her letter of April 27 specifically characterized the problems on the bus as sexual harassment, and her letters of May 8 and 26 reported additional incidents of sexual harassment.

The May 8 letter reported that boys on the bus were making lewd jokes about male anatomy. Her letter of May 26 reported that boys on the bus were tormenting the girls by pointing and shoving big rubber knives at them, pretending to stab them. The complainant reported that her daughter began to cry when she recalled the incident. Use of foul language by the boys against the girls was also cited. Taken together, the complainant's letters charged that boys riding with her daughter subjected girls to a pattern of overt sexual hostility accompanied by actual or threatened aggressive physical contact and the repeated use of obscene or foul language, including offensive sexual slurs and epithets and

other obscene sex-neutral words or expressions directed at girls in a hostile manner.

At no time did the district treat the complainant's correspondence as alleging a violation of the district's sexual harassment policy. The coordinator acknowledged that, while he did not investigate any of the specific incidents cited in the complainant's March 18 correspondence, he assumed that the incidents had occurred as reported. The coordinator indicated he had been told by the day care provider about the incident in which the girls were chased off the bus while being called derogatory sex-related names. However, he also stated that he had not investigated the two most recent incidents, which the complainant indicated had occurred after March 10, involving the use of expletives and the lewd reference to an incestuous sex act with student A's father. The coordinator indicated that he did not undertake further investigation as he believed that the same three boys earlier identified were involved in these incidents and he had already set in motion a process for improving conditions on the bus. He expected improvements to come about, as he discussed in subsequent memoranda and correspondence, through keeping the principal advised of the problems, counseling and support for the driver, stricter enforcement of the district's discipline rules, and continued monitoring by the transportation department.

Subsequent incidents of harassment reported by the complainant or other adults were similarly treated as instances of inappropriate language or behavior and responded to in that manner. The district does not dispute that the behavior cited in the complainant's letters of May 8 and May 26 occurred; however, it contends that the transportation coordinator looked into the complainant's charges of lewd jokes and the use of foul language against the girls, but that the misbehavior could not be lined to specific students. In keeping with the usual procedures employed by the transportation department, the district's

investigation consisted of checking with the bus drivers regarding their knowledge about the allegations, of observing the children at the bus stop, and of discussions with the students at the bus stop or on the bus. A transportation department employee indicated that she was asked to ride the bus in May but was not told the reason for the assignment or given any information about the problems reported. There is no indication that students, including the complainant's daughter, were questioned privately. Moreover, since no records were kept of the investigation of these particular incidents or contemporaneous reports made, it is impossible to determine whether all leads were pursued or possible witnesses examined.

One of the other incidents reported by the complainant on May 26, 1992 involved boys frightening the girls pretending to stab them with rubber knives. The district claimed that the incident had been reported by another parent and that the bus driver had warned the boy responsible. However, there are no discipline slips relating to this incident. Further, when questioned by OCR, neither the morning nor the afternoon bus driver recalled such an incident. The afternoon bus driver told OCR he recalled that the coordinator questioning him about this incident, but the driver had no recollection of seeing a knife or admonishing a student for brandishing one.

On June 1, it was reported by the driver and a parent that student 2 pushed students and threw rocks at them, grabbed a girl's crotch and made sexually hostile, obscene remarks to her and another female student. No formal report was made of the parent's expression of concern.

The district contends that the boys responsible for the misbehavior on the bus were disciplined. In April 1992, at an individualized education program (IEP) meeting held for student 1, district staff decided that the student would ride the special education bus for the remainder of the school year because of his escalating behavior problems. Similarly, on

June 2, 1992, district staff decided to place student 2 permanently on the special education bus. Student 3, also identified by the complainant as a chief perpetrator, was, as mentioned earlier, counseled by the principal on or about March 10, about his bad language. District records also reflect that he was assigned a detention on March 17 for writing an obscene word on the bus window.

District records confirm that students 1 and 2 received detentions and suspensions for their disruptive behavior on the bus. With the exception of student 2's removal from the school bus for other actions taken against these two students pertained to the sexual harassment and use of obscene language which the complainant had reported in her correspondence. Further, with the exception of the detention imposed for the March 17 incident, student 3 received no disciplinary sanctions for acts of sexual harassment.

In addition to the incidents reported by the complainant or other parents, district records show that two other students were cited for making vulgar gestures or swearing on April 21; these slips do not show that any disciplinary sanctions were imposed.

During spring 1992, the district attempted various efforts to improve student behavior on student A's bus route. In April, the Cedar Ridge school newsletter published a reminder about the discipline procedures and consequences for violating the school rules. The coordinator continued to observe students at selected bus stops and to keep in contact with the drivers. On May 11, the transportation director and Cedar Ridge principal boarded student A's bus and specifically warned the students not to use profanity. However, these efforts failed to stop the harassment.

In written responses dated March 31 and June 1, 1992, to the complainant's letters, the coordinator reported that disciplinary action had been taken against students 1 and 2,



and acknowledged that it was taking longer to curb the inappropriate behavior than hoped. In a letter to the complainant, dated June 4, 1992, the superintendent further acknowledged the problems that her daughter had experienced on the bus. He indicated that further corrective action would be taken in fall 1992.

In fall 1992, the director of the transportation department met with the complainant to select an experienced bus driver for her daughter's route for the upcoming school year. The complainant has not reported any problems involving sexual harassment during the 1992-93 school year.

OCR also found that similar problems were experienced by female students on another bus route in the district. Parent A has two daughters who attended Forest Hills Elementary School during the 1991-92 school year; student E was in first grade, and student F was in fourth grade. Parent A told OCR that whenever student F was sick, student E did not want to go to school because she was afraid to ride the bus alone. Both girls were reportedly teased about their anatomy, shoved, touched, and called obscene, sexually derogatory names while riding their school bus. One boy in particular, student 6, was said to be responsible for much of the trouble. In fall 1991, three parents, including Parent A, who were concerned about these problems together called the transportation department to complain about student 6. Parent A told OCR that she specifically mentioned touching, pushing and vulgar language. Parent A ultimately decided to drive her daughter to school as the situation did not permanently improve. The district, however, did not retain records of complaints regarding bus problems other than in student A's case, and the coordinator could not recall receiving the complaint about this other bus route. Parent A asserted that, had she known about the district's sexual harassment policy when she lodged her complaint in fall 1991, she would have emphasized the sexual nature of the problem and pursued the matter more vigorously.

Another incident of sexual harassment brought to the district's attention occurred at Oak Point Intermediate School. According to district records and witness statements, on May 5, 1992, during recess, student G, a female sixth grader, was tripped, spit on, and subjected to hurtful, lewd remarks about her anatomy by five male sixth graders (students 7, 8, 9, 10, and 11). According to her parents, student G was quite upset by the actions of the boys because, as a young girl entering puberty, she was very sensitive about the development of her body.

The Oak Point principal determined that the male students had used inappropriate language, misconduct identified under the severe clause of the school's assertive discipline program. Use of the severe clause allows imposition of a greater penalty than would otherwise be applicable under the progressive discipline plan.

The principal informed OCR that she characterized the actions of the five male students as inappropriate language rather than sexual harassment because this is how she has always dealt with such behavior. She contacted the boys' parents about the incident and assigned each of the boys a one-hour detention; student 7 received three additional days of suspension based on other misbehavior of a nonsexual nature on May 5. The principal told OCR that the one-hour detention was based on the students' prior disciplinary history and the nature of the offense. She indicated that she would now view the incident as sexual harassment.

A review of the discipline files of the five male students who had harassed student G revealed that all of them had a history of violating school and bus rules during the second semester of the 1991-92 school year. Student 7 had been reported by his bus driver and other school personnel for profanity, swearing or sexually harassing behavior on eight other occasions between November 1991 and June 1992. Five of these incidents occurred on the bus between March and June

4, 1992. Consistent with the school's assertive discipline plan, the student was suspended from the bus for three days in April for various acts of misconduct, one of which included swearing, and was again suspended for three separate five-day periods in April and May; two of the May suspensions were in response to sexually suggestive or harassing language. The student also received a one day suspension in June for making inappropriate remarks of a sexual nature in a classroom; at that time he was already being disciplined at the highest step of the assertive discipline plan. After each bus suspension, the student would return to the bus and repeat or exacerbate the behavior. Although the district was in the process of beginning the assessment required for special education eligibility, there is no indication that measures were instituted to oversee the student on the bus or to isolate him from other students until more permanent measures could be taken.

Inadequate handling of sexual harassment charges was also alleged by parents at the Central Middle School. Parent E reported that at the beginning of the 1991-92 school year her daughter, student H, was subject to verbal abuse at the bus stop; she was continually teased about being flat-chested. When Parent E called the transportation department to complain, she said she was told that the bus driver could not do anything about the teasing because it did not occur on the bus. The district does not have a record of this call, and the coordinator did not recall receiving such a complaint. He stated that the district has no official jurisdiction over the bus stops but does attempt to deal with behavior problems occurring at these locations.

Parent E also reported that her daughter was propositioned in the school hallway at her locker; the boy allegedly offered student H various amounts of money to perform sex acts. Though the incident was allegedly reported to the Central Middle School principal by the building janitor, in interviews

with OCR, neither the principal nor the janitor recalled the incident. Parent F, whose daughter was also propositioned by the same boy, substantiated Parent E's report. Both parents indicated to OCR that the principal had called them to discuss the matter, indicating that the principal was aware of the situation. The district's file, containing six sexual harassment reports for 1991-92, does not include this incident.

In May 1992, during a social studies class, a seventh grade male (student 13) repeatedly made remarks of a sexual nature regarding male and female anatomy and various sex acts to three seventh grade female classmates (students B, C, and D). Student 13 is the same boy reported by Parents E and F to have propositioned their daughters. The female students reported that four other girls were also harassed by student 13 in the social studies class. Student 13 also touched the girls and, on one occasion, physically restrained one of them so that she could not escape his lewd remarks. According to the female students, the teacher witnessed the harassment, but was unresponsive to their requests for assistance. The teacher's response was to offer to change the boy's seat. According to the students, the boy's seat already had been changed numerous times as girls reported that he was bothering them.

During mid-May 1992, students B, C, and D reported these incidents to a school social worker and a guidance counselor who advised the girls how they might handle the problem and discussed the matter with student 13. At least a week elapsed before the principal met with the girls and the boy after having been advised of the problem. At this meeting, the male student denied the accusations. According to the principal, a few days later, the female students presented an obscene note which they believed had been written by the male student. The note contained sexually explicit language and suggested that the writer and the reader perform a particular sex act. After examining the note, the principal



met with the three girls and suggested the possibility that one of them could have written the note. On May 21, 1992, the principal met with the male student who denied writing the note; the principal stated that the student was suspended from school for one day for his inappropriate behavior while in the social studies class.

In August 1992, student B's mother discussed with the sex equity coordinator for the Minnesota Department of Education (MDE) her dissatisfaction with the principal's handling of the May incident. The MDE coordinator called the district's director of personnel about the incident. The director told OCR that she had not been informed about the incident as required by the district's sexual harassment policy. On August 22, 1992, the superintendent sent the principal a memorandum criticizing him for failing to report the incident as sexual harassment pursuant to the district's sexual harassment policy. Because the director of personnel was concerned that the principal had not handled the matter appropriately, the district had its attorney conduct an independent investigation of the complaint. As a result of the investigation, on October 30, 1992, the district issued the principal a Notice of Deficiency. The specific deficiencies discussed in the letter were the principal's inappropriate response to the students' sexual harassment complaint, his failure to use good judgment, and omissions apparent in his investigation. The district also relieved the principal of any responsibility for processing sexual harassment complaints at the school, assigned a female administrator in the building to these responsibilities, and instituted procedures to ensure timely responses to sexual harassment complaints.

No disciplinary action was taken against the teacher nor was any further disciplinary action taken against the male student. At the end of the 1991-92 school year, the teacher retired and student 13 transferred to an out-of-state district.

Since the beginning of the 1992-93 school year, there has been an extensive campaign to inform district employees, parents and students about the district's policy on sexual harassment and the procedures for notifying the district of alleged violations. As a result, the evidence shows that students are more aware of their rights relative to sexual harassment by other students. The sexual harassment policy was also revised in August 1992 to emphasize that charges of student-to-student sexual harassment must be reported to the director of personnel and investigated under the policy.

In August 1992, district administrators attended an all-day training session on sexual harassment. In October 1992, all bus drivers attended a two hour training session on this topic. From September to November, each school conducted at least one lengthy staff training session on sexual harassment led by an attorney, the director of personnel, or an outside expert.

The district has also held sessions to discuss sexual harassment with students beginning at the fifth grade and has offered opportunities for parents to discuss the issue. Dissemination of the district's sexual harassment policy now reaches all parents in a meaningful manner. The district's curriculum and curricular materials have been reviewed and include, as appropriate, the issue of sexual harassment and gender fairness. For younger elementary school students, this includes discussion of self-respect, teasing, and tolerance for individual differences.

The district has also strengthened its program for maintaining good behavior on the buses. At the beginning of the current school year, the district distributed a new bus behavior pamphlet to parents, which contains a prohibition of sexual harassment, and instituted incentive awards for good behavior on the bus. In addition, the district formed a parent-school advisory committee on transportation issues.

The director of transportation indicated that these actions were taken in response to the concerns raised by the complainant.

For the first ten weeks of the 1992-93 school year, the district's director of personnel received copies of more than 50 written sexual harassment complaints. These incidents included verbal abuse and inappropriate touching, patting or pinching. Information gleaned from the student complaints shows that school staff investigated the reports. In most instances, the district appeared to have taken appropriate action. The district's responses included counseling the offending student, contacting the parent of all students involved in the incident, giving the offending student a one-hour after-school detention, and/or referring the student for social work services.

However, review of all of the sexual harassment reports forms for 1992-93 reflects a continuing confusion as to what types of behavior constitute sexual harassment. The forms are being used by some students to report any behavior by another student that they find objectionable. Thus, incidents of name-calling between students of the same sex are included in the reports as well as an incident of harassment of a student because of the student's disability. In addition, the forms themselves frequently do not include sufficient specificity as to the behavior alleged or the behavior found to have occurred to determine whether sexual harassment was involved. Moreover, the forms do not contain an express finding as to whether sexual harassment occurred.

During the first 10 weeks of 1992-93, there were 15 reports of sexual harassment on the bus from drivers and parents of bus users. This group of complaints does not include any repeat violations. Instances of reported harassment included five instances of male students touching another male student's private parts, one instance of a boy grabbing the crotch of a girl and a boy, and a few instances of

objectionable comments about sexual activity or sexual attributes. The age of the elementary school students involved in the touching was not always given, making those incidents difficult to evaluate.

## ANALYSIS

OCR evaluated the incidents cited above to determine whether female students had been subjected to sexual harassment and whether the acts of harassment were sufficiently severe or pervasive to create an intimidating, hostile, or offensive environment for the female students. The preponderance of the evidence established that eight females, students, A, B, C, D, E, F, G, and H, were subjected to multiple or severe acts of sexual harassment resulting in a sexually hostile environment. The harassment included explicit, offensive sexual references and name calling directed at the girls, unwelcome touching, physical contact and intimidation, and taunting. The hostile environment arose in several locations, including district bus routes, a playground, school hallways, and a classroom.

From the standpoint of a reasonable female student participating in district programs and activities in these locations, the sexually offensive conduct was sufficiently frequent, severe and/or protracted to impair significantly the educational services and benefits offered. In some instances boys in primary grades engaged in sexually hostile words and conduct against equally young girls. The fact that neither the boys nor the girls were sufficiently mature to realize all of the meanings and nuances of the language that was used does not obviate a finding that sexual harassment occurred. In an educational setting, sexual harassment may result from words or conduct of a sexual nature communicated in a manner that would, under the circumstances, offend, stigmatize, or demean the student against whom the harassment is directed, on the basis of sex. In this case, there is no question that even the youngest girls



understood that the language and conduct being used were expressions of hostility toward them on the basis of their sex and, as a clear result, were offended and upset.

In some circumstances, the impact of sexual harassment was heightened by its occurrence in areas where the students' ability to avoid the misconduct was restricted. With respect to student A and the other girls on the bus, the conditions of the bus ride were particularly offensive and severe because of the age of the students and because the girls were confined to the bus and unable to escape their harassers.

In the case of five of the eight female students, there is no dispute that the district had actual notice of the existence of a sexually hostile environment sufficient to raise a duty to take adequate corrective action. In these instances, the concern was conveyed to responsible district personnel by the students affected or their parents. In the other three instances, there is evidence that the harassment was reported; however, the reports cannot be corroborated through district records or testimony.

OCR next evaluated whether the district took sufficient action to respond to the hostile environment which existed for students on the Cedar Ridge bus and whether its actions with respect to other instances of sexual harassment complied with Title IX requirements.

OCR determined that the actions taken by the district in response to information indicating sexual harassment on the Cedar Ridge bus did not succeed in abating the hostile environment. The district received notice of the sexual harassment as of the complainant's March 18 letter which described incidents of sexually derogatory and abusive language and actions directed at female students. Although the district attempted in good faith to address the complainant's concerns, the evidence shows that harassment continued until the end of the school year. As detailed

above, reported acts of sexual harassment occurred in February, during the week of March 10 to March 18, again in early and late May, and in early June at the end of the school year. In addition, acts of misconduct involving use of profanity and vulgar gestures were reported by one of the bus drivers in April, which, in the context of the hostile environment already created, could be expected to add to the female students' feelings of discomfort. In correspondence to the complainant, district officials themselves acknowledged that their immediate efforts to curtail the problems were insufficient to stop the harassment.

OCR determined that the district's response during this period was flawed by its failure to treat the incidents as possible sexual harassment and to follow the related procedures. As indicated above, the complainant's correspondence of March 18 contains specific incidents of student-to-student sexual harassment not mentioned in the initial telephone conversations between the complainant and the transportation department as well as incidents which occurred after the date of the call. However, the transportation coordinator did not attempt to question the complainant about the incidents involved or conduct a further investigation. His response reflected his belief that the approach used to respond to the complainant's original expressions of concern about foul language continued to be appropriate for the new allegations.

But since the original response was not focused on ascertaining whether particular incidents occurred, identifying all of the students responsible, which female students were adversely affected and to what extent, whether the behaviors at issue constituted sexual harassment, and, if so, what specific responsive measures were necessary, these questions remained unanswered. The initial investigation of the problem by the coordinator did not satisfy the criteria for a complete and thorough investigation: questioning of students was done on the bus without the privacy necessary

to enable students to talk freely without worrying about "tattling," no records were kept of the discussions with students, the complainant's daughter was not questioned, the identity of all of the students identified as possible perpetrators was not established, and the nature and scope of the problem itself was understood only as swearing or bad language rather than harassment directed at female children.

Similarly, complete investigations of sexual harassment reported by the complainant on May 8 and May 26 were not conducted in that private interviews of possible student witnesses were not conducted and no records were kept.

The drawbacks of the district's generalized approach to the situation are further underscored in the district's failure, at any time other than the incident of June 1, to establish culpability or forcefully discipline any of the particular students believed to be involved for behavior constituting sexual harassment.

The generalized approach taken by district personnel included specific actions which were intended to improve bus behavior, such as the appeal for parental cooperation, published in the school's April newsletter. However, the efforts did not stop the harassment and did not provide the degree of supervision necessary to respond to the situation. Close monitoring of the entire bus by the drivers was not possible. However, the district did not assign another adult to supervise the bus pending resolution of the problem. Additional supervision would be particularly appropriate where individual perpetrators could not be identified, or where, as the district asserts, the progressive sanctions which are a part of the schools' assertive discipline plans would not be effective. Another option not utilized by the district would have been to assign another driver to the afternoon route. The evidence indicates that the problems escalated after January 1 when a new driver who was not an effective disciplinarian was assigned to this route.

OCR also received reports from two other parents regarding the sexual harassment of their daughters on the bus. Although these parents indicated that they had reported the problem, it was not possible to corroborate this with District personnel as the records of bus complaints from 1991-92 were not kept. Under the district's sexual harassment policy, a record should have been kept of the report and an investigation conducted. The parents did not make formal complaints at least in part because they were unaware of the district's sexual harassment policy. Prior to 1992-93, the only notice given to parents of elementary school students, such as the parent of students E and F, was a brief statement regarding the prohibition of sexual harassment contained in the district's school calendar. Despite the lack of corroboration, these accounts tend to show the sexual harassment of girls participating in transportation services has occurred and that other parents in addition to the complainant were dissatisfied with the district's treatment of the problem.

In addition, a sixth grade male student on another bus was written up by the bus driver for inappropriate sexual language on seven occasions between November 1991 and June 1992. By May 1992, the student was suspended twice from the bus for periods of five days at a time. Each time the student returned to the bus, the behavior was repeated.

The district's response during 1991-92 to incidents at Central Middle School and Oak Point also reflects the district's failure to follow its sexual harassment policy. At the middle school, school officials and the teacher involved were slow to act to stop the harassment even though the boy involved had previously been involved in sexually harassing other female students during the same school year. The district did conduct full investigation of the shortcomings of the original response beginning in August 1992 after the director of personnel was informed by MDE that the policy may not have been followed. At Oak Point, school officials assigned



only a one-hour detention in a case of severe harassment by five boys, including one boy with a prior history of aggressive use of explicit sexual language.

The district has argued that greater tolerance of special education students' misconduct is necessary to achieve their individual educational objectives and to adhere to procedures legally required for students with disabilities. The district also contends that some special education students are more likely to engage in impulsive and unacceptable behavior, including behaviors that would constitute sexual harassment, and are, as a consequence of their disabilities, less likely to respond to progressive disciplinary measures. In this regard, the district notes that students 1, 2, and 13 were special education students and that student 7 had been referred for evaluation.

Under Title IX standards, a recipient may not act any less effectively to combat sexual harassment by special education students which interferes, on the basis of sex, with other students' receipt of the services offered by the recipient. The rights of students with disabilities can be respected through adherence to procedures required by federal law. There is no indication in the present case that the need to follow these procedures actually interfered with implementation of the district's sexual harassment policy. In any event, the rights of students with disabilities may not operate as a defense of behavior which singles out students, because of their sex, for adverse consequences.

During the 1992-93, the evidence shows that the district stepped up enforcement of its sexual harassment policy. The district's sexual harassment policy was amended to emphasize that reports of student-to-student harassment must be forwarded to the director of personnel and that school officials would be disciplined for not following this policy. Intensive training of administrators and staff to recognize the possibility of sexual harassment in student-to-student

interactions and measures to notify students and parents of the district's sexual harassment policy were implemented. The district's curriculum and curricular materials have been reviewed and include, as appropriate, the issue of sexual harassment and gender fairness. The district has also strengthened its program for maintaining good behavior on the buses.

Procedures for identifying and reporting student-to-student harassment have also been strengthened. Students and staff are encouraged to report alleged harassment, and the district documents on the form the action taken. However, review of the sexual harassment report forms for 1992-93 reflects a continuing confusion as to what types of behavior constitute sexual harassment. In addition, the forms frequently do not include sufficient specificity as to the behavior alleged or the behavior found to have occurred to determine whether sexual harassment was involved. Most of the forms do not contain an express finding as to whether sexual harassment occurred. Moreover, although the director of personnel was made responsible for reviewing the adequacy of the administrators' responses, no specific procedures are in place to document that this function is performed.

The district also lacks guidelines which would assist building administrators to determine when a pattern of harassment or injury requires that more stringent sanctions be imposed. The district's code of conduct mandates that sexual harassment be treated under the "severe clause." Classification under the severe clause allows a more stringent punishment than might be permitted under the progressive discipline plan. However, review of the incident reports indicates that alleged harassment is not always treated under the severe clause. In addition, for students with extensive disciplinary histories, use of the severe clause does not lead to a more stringent punishment since these students are already at the higher steps of the plan.

OCR concluded that the failure to make express findings regarding the occurrence of sexual harassment constitutes a continuing violation of Title IX. The district contends that specific labeling of such incidents as sexual harassment is not necessary. However, OCR found that the failure to recognize the incidents as creating a sexually hostile environment for the students involved was seen by students and their parents as underestimating the injury which they experienced.

Based on the evidence as a whole, as of the end of the 1991-92 school year, the district had sufficient notice to conclude that a sexually hostile environment had arisen. While the district made an effort to respond, OCR found that the district's actions were not sufficient to eliminate completely the sexual harassment and its effects. The district has made additional efforts in 1992-93; however, these efforts remain incomplete. The district's sexual harassment policy is still not being implemented to require an express finding of sexual harassment. In addition, OCR is not persuaded that the district is now employing sanctions calculated to stop sexual harassment or provide an adequate degree of supervision where required. There was no indication of a change in procedures that would prevent repeated acts of harassment from occurring, as was the case with students 7 and 13 in 1991-92.

Based on the above OCR concluded that the district violated Title IX and its implementing regulations at 34 C.F.R. §§ 106.31(b) (1-4) and (7), in that it failed to take timely and effective responsive action to address sexual harassment which denied female students, because of their sex, equal educational services. The evidence shows that the district knew or should have known of the occurrence of the harassment but did not respond forcefully to end it.

Based upon written assurances that the district will implement the remedial actions set forth in the enclosed

document, OCR considers the district to be presently fulfilling its obligations under Title IX and its implementing regulation with respect to the compliance issues identified during this investigation. The salient points of this plan include the district's agreement to: 1) develop written guidelines to assist its staff in making the determination that a student's misconduct constitutes sexual harassment; 2) document fully all allegations of sexual harassment and make an express finding as to whether sexual harassment has occurred; 3) develop guidelines to assist staff in determining the appropriate disciplinary sanctions for sexual harassment; 4) upon determining that repeated acts of sexual harassment are occurring in a particular district setting or activity, take additional affirmative steps to correct the problem, including the assignment of adult aides or monitors to supplement existing supervision; and 5) continue various actions it had already initiated, including notice to staff, parents, and students about its sexual harassment policy and procedures for filing complaints, implementation of the policy and reporting measures related thereto, provision of training and education on sexual harassment for staff and students, notice to parents of incidents of sexual harassment involving their children when allegations are not minor and, where appropriate, provision of counseling to victims of sexual harassment. In the settlement agreement, the district disclaims OCR's findings and represents that execution of the agreement does not constitute an admission of either compliance or noncompliance with Title IX.

This agreement, when implemented, will resolve the violation identified. Thus, OCR is closing this complaint effective the date of this letter. Continued compliance, however, is contingent upon carrying out the terms of the enclosed agreement. Failure to implement the settlement agreement may result in a finding of violation. As in our standard practice, compliance with commitments will be monitored by OCR in accordance with the time frames outlined in the settlement agreement.



Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, could constitute an unwarranted invasion of privacy.

This letter of findings addresses only the issues discussed herein and should not be construed to cover any other issues regarding compliance with Title IX which may exist. Further, individuals filing a complaint or participating in an OCR investigation are protected against harassment, intimidation, or retaliation under 34 C.F.R. §100.7(e), which is incorporated by reference in the Title IX regulations at 34 C.F.R. §106.71.

If you have any questions about our determination, please contact Dr. Karen H. Vierneisel, Director, Elementary and Secondary Education Division, at 312-353-2480.

Sincerely,

Kenneth A. Mines  
Regional Director

Enclosure

cc: Mr. Gene Mammenga  
Commissioner of Education

July 24, 1992

(2)

REGION IX  
Old Federal Building  
50 United Nations Plaza, Room 239  
San Francisco, California 94102

Dr. John D. Maguire  
President  
The Claremont Graduate School  
160 East 10th Street  
Claremont, California 91711

(In reply, please refer to Docket Number 09-92-6002)

Dear President Maguire:

The Office for Civil Rights (OCR), U.S. Department of Education has completed the compliance review of the Claremont Graduate School (CGS). The review addressed the compliance of CGS with Title IX of the Education Amendments of 1973. The specific focus of the compliance review was to determine whether CGS maintains an educational environment free from sexual harassment, whether CGS has responded to instances of sexual harassment against its students in a prompt and equitable manner, and whether CGS has implemented procedures to adequately address such complaints.

OCR has the responsibility for enforcing Title IX and the Department of Education implementing regulations, found at 34 C.F.R. Part 106. Title IX and the regulations prohibit discrimination on the basis of sex in education programs operated by recipients of federal financial assistance through

the Department. Since CGS receives such assistance, it is subject to the mandates of the statute and regulations. OCR found that the CGS was not in compliance with Title IX and its implementing regulations in a number of areas regarding its procedures to address sexual harassment complaints and notification to students of these procedures. However, CGS has provided OCR with written assurances to address these areas of non-compliance, as explained more fully later in this letter.

This Letter of Findings (LOF) represents a summary of the facts gathered during review, the applicable legal standards, and the compliance determinations made regarding the issues addressed in the compliance review.

#### Legal Standard

The implementing regulations for Title IX provide, at 34 C.F.R. section 106.31(a), that no person shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity. Under section 106.31(b), discriminatory treatment may include: different treatment in determining whether a person satisfies any requirement for the provision of an aid, benefit, or service (section 106.31 (b) (1)); providing different aid, benefits, or services or providing them in a different manner (section 106.31 (b) (2)); denying an aid, benefit, or service; (section 106.31 (b) (3)); subjecting any person to separate or different rules of behavior, sanctions, or other treatment (section 106.31 (b) (4)); and otherwise limiting any person in the enjoyment of any right, privilege, advantage, or opportunity (section 106.31 (b) (7)).

When individuals who are participating in a program or activity operated or sponsored by an educational institution

are subjected to sexual harassment, they are receiving treatment that is different from others. A common working definition of sexual harassment in the education setting is: unwelcome sexual advances, requests for sexual favors, or other sex-based verbal or physical conduct where (1) submission to such conduct is explicitly or implicitly made a term or condition of the individual's education; or (2) such conduct has the purpose or effect of unreasonably interfering with the individual's education creating an intimidating, hostile, or offensive environment.

An educational institution may be found in noncompliance with Title IX and regulations as a result of such harassment if the harassment is sufficiently severe or pervasive to create a hostile or offensive educational environment. If those responsible for harassment are employees or agents of the institution, acting within the scope of their employment or agency, the institution itself will also be considered responsible for the harassment. If the harassment is carried out by non-agent students, the institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment. The institution will be considered to have responded adequately to knowledge of harassment if it conducted a thorough and objective investigation and took immediate action to fully remedy the harm that occurred and to prevent sexual harassment from occurring in the future.

Recipient institutions must also meet certain other specific legal obligations concerning internal grievance procedures and notification of a non-discrimination policy under 34 C.F.R. sections 106.8 and 106.9. Section 106.8(a) requires that the institution designate at least one employee to coordinate its responsibilities under Title IX, including investigation of any complaint of discrimination on the basis of gender, and notify all students of the name, office, address and telephone number of the designated employee(s). Under



section 106.8(b), the institution is required to adopt and publish a grievance procedure providing for the prompt and equitable resolution of student complaints alleging noncompliance with Title IX or its implementing regulations. Section 106.9 requires the institution to publish a notice of non-discrimination on the basis of gender in publications made available to students or applicants for enrollment which includes at least the following information: 1) that the requirement not to discriminate extends to both employment and admission, and 2) that inquires concerning the application of Title IX to the recipient may be referred to the employee designated under Section 106.8 or to the Office for Civil Rights (OCR). Postsecondary institutions are not required to maintain separate grievance procedures for sexual harassment. However if the institution elects to process sexual harassment complaints through a separate grievance procedure, that procedure must meet the regulatory requirements for notice and must also be a "prompt and equitable" procedure.

In addition, 34 C.F.R. section 106.31(d) imposes specific requirements upon any recipient institution which requires participation by any student in any education program or activity not operated wholly by such institution, or facilitates, permits or considers such participation as a part of or equivalent to an education program or activity operated by such institution. This section specifically applies to participation in educational consortiums. Section 106.31(d)(2)(i) provides that any such recipient institution must develop a implement a procedure designed to assure itself that the operator of the other educational program or activity takes no discriminatory action affecting any student which would be prohibited by 34 C.F.R. Part 106. Section 106.31(d)(2)(ii) provides that, if such discriminatory action occurs in the other educational program or activity, the institution shall not continue to facilitate, require, permit or consider participation by students in such program or

activity.

### Summary of Investigation

The Claremont Graduate School (CGS) is a private college and is one of six independent colleges in the consortium of the Claremont Colleges including CGS, Claremont, McKenna, Harvey Mudd, Pitzer, Pomona, and Scripps. Each college has its own faculty, board of trustees, separate campus and curriculum emphasis. However, the campuses are grouped closely together and CGS students participate in classes, work and utilize facilities on other campuses. The CGS offers the Masters and Doctors degrees in fourteen programs. The OCR compliance review included interviews of thirty individuals affiliated with CGS, including students, faculty members, staff person representatives from student organization and campus resource services, campus security, and administrators. OCR also interviewed administrators from the other colleges within the consortium. In addition, OCR reviewed CGS policies and procedures applicable to complaints of sexual harassment against students, and publications notifying students of these policies and procedures.

The CGS Sexual Harassment Policy (Policy) was adopted on April 29, 1991. The draft of the Policy was a result of a sexual harassment grievance filed by a student in October 1990. The Policy confirms that the CGS is committed to an atmosphere free from sexual harassment. It states that is the intention of the CGS to prevent, correct, and if necessary, discipline behavior which violates this Policy. The Policy defines the type of actions that constitute sexual harassment, and is consistent with the OCR definition of sexual harassment. The Policy lists, by title, the appropriate officials to receive reports of sexual harassment and states

that all reports of sexual harassment will be promptly investigated. An attachment to the Policy lists designated hearing bodies to handle sexual harassment complaints depending upon the status to the grievant and accused as a student, staff person, or faculty member.

The CGS catalog includes a sexual harassment policy statement. It reiterates the CGS commitment to maintaining an environment free from sexual harassment. It briefly defines sexual harassment and states that CGS will investigate reports of sexual harassment and take remedial action. The statement refers students to the Dean of Students for information about the policy. The Policy is made available to students through registration and through the Dean of Students.

In September 1991, the Claremont University Center (CUC) developed a sexual assault policy for use by the CGS and the Central Programs and Services within the CUC. The policy ensures that treatment, support, and information shall be provided to victims of sexual assault. The policy includes specific steps for reporting a sexual assault, securing a resolution, and accessing campus resources for support. Subsequent to the OCR review, the CUC Personnel Director drafted a sexual harassment policy targeted toward employees. The policy was submitted to OCR for review and has not been published. The policy forbids any action by an employee towards another employee or student which could be construed as sexual harassment. Included in the policy are actions an employee can take; the contact persons for filing a complaint; and the procedure to be followed if the complaint is filed by a student or faculty against a staff or a staff against a student or faculty.

NON-DISCRIMINATION POLICY STATEMENT,  
DESIGNATION OF A TITLE IX COORDINATOR, AND  
NOTICE TO STUDENTS

The CGS student catalog includes a non-discrimination policy statement which prohibits discrimination on the basis of gender. The policy statement refers inquiries concerning Title IX compliance to the Dean of Graduate School Faculty/Vice President for Academic Affairs, but does not refer students to OCR. OCR found that the Dean of Students has also been designated as an employee to handle sex discrimination and sexual harassment complaints. The CGS written Sexual Harassment Policy explained below lists the Vice President for Academic Affairs/Dean of the Faculty, Dean of Students, and the Personnel Representative by title as contacts regarding complaints of sexual harassment. However, the names, location and telephone numbers of these designated employees are not listed. The CGS catalog also includes notices regarding the Sexual Harassment Policy and the Student Grievance Procedure. However, while these notices refer students to the Dean of Students, her name, telephone number and location are not included in the notices.

OCR found that the non-discrimination policy, as written, does not comply with the requirements of section 106.9(a) in that it fails to refer students to OCR for information regarding Title IX compliance, in addition to the designated CGS employee(s). OCR further found that CGS has designated several employees to coordinate its efforts to comply with Title IX, including investigation of complaints, as required by section 106.8(a). However, CGS has not properly notified students in the information regarding sexual harassment and complaint procedures of the specific names, office addresses and telephone numbers of these designated employees, as required by section 106.8(a).

RESOLUTION OF COMPLAINTS OF SEXUAL  
HARASSMENT

The grievance procedure requirement under section 106.8(b)



requires recipients to identify and resolve issues relating to Title IX compliance in a prompt and equitable fashion. In reviewing Title IX grievance procedures, OCR is not concerned with the particular type of procedure or whether the recipient has one or several procedures. In determining whether a recipient's grievance procedures meet the "prompt and equitable requirement under section 106.8(b), OCR will look at whether the recipient has included elements such as: 1) notice to students and employees of the procedure and where to file complaints; 2) a thorough investigation of complaints, including an opportunity for complainants to present evidence; 3) designated time frames for the investigation and resolution of complaints; 4) notice to complainants of disposition of complaints; and 5) the right to appeal findings.

#### Student Grievance Procedure

The CGS adopted the "Student Grievance Procedure" (hereinafter the Procedure) in May 1977. The Procedure is applicable for complaints of sexual harassment by student versus a student and student versus a faculty on the CGS campus. Students are directed to the Procedure by an attachment to Sexual Harassment Policy. The Procedure is published and available through the Dean of Students and a notice of its availability referenced in the CGS catalog. The catalog advises students to contact the Dean of Students for information regarding filing a complaint under the Procedure.

The Procedure contains definitions, time limits, and an opportunity to mediate the grievance prior to a hearing. The Procedure provides for a student to grieve on matters that are discriminatory on the proscribed bases, including sex. However, the Procedure provides that faculty judgment of academic performance is not subject to grievance procedures. Complaints must be filed within six months after the

situation took place.

The steps in the Procedure include the following: an informal resolution; a formal grievance; a committee hearing; a recommendation to the Dean of CGS; and a written decision and notice to the parties. Each step is governed by time limits. The Procedure provides that failure on the part of the student to meet the time frames will be considered an abandonment of the complaint, but also provides for an extension of time frames. OCR was informed by CGS that the six month filing deadline is tolled once the student initiates the informal steps in the Procedure.

The informal resolution component of the Procedure requires that the student initially discuss the problem with the person involved in the dispute. If the problem is unresolved the student is required to consult with the Dean of Students and requests a meeting between the student, the accused party and the Dean of Students. If the complaint is not resolved at this meeting, both parties complete a statement of grievance form which is forwarded to the Committee on Student Grievances. This Committee holds a hearing at which each party presents statements and responds to questions. The Committee then makes a decision and recommendation to the Dean of the CGS. The Dean either agrees or disagrees with the Committee's recommendation and sends written notice of the disposition of the complaint to all parties. The Procedure provides an opportunity for an appeal of the Dean's decision to the President only if the Dean did not accept the recommendation by the Committee.

If the grievance can be resolved by mutual consent on the part of both parties before it comes to hearing, the Procedure outlines two provisions for a pre-hearing settlement. If the proposed resolution requires administrative action, it must have the approval of the Dean of CGS. If the proposed resolution does not require administrative action, the

resolution constitutes the final procedural step and no further complaints or defenses on the matter are heard.

OCR found that CGS has adopted and published a grievance procedure which addresses complaints of sex discrimination, including sexual harassment, filed by students against other students and faculty members. However, OCR found that the Procedure contains elements which fail to meet the "equitable" standard of section 106.8(b). The Procedure excluded grievances concerning faculty decisions on academic performance. This limitation does not allow any avenue of redress if the student believes the decision is discriminatory on the basis of sex, such as instances of quid pro quo sexual harassment which involve grading decisions.

In addition, the Procedure requires all grievants to discuss the problem directly with the other person involved in the complaint, first alone and then again with the Dean of Students. Because of the nature of sexual harassment and other allegations of discrimination, a mandatory requirement to meet with the accused prior to filing grievance is not equitable. Finally, the Procedure places a limitation on the complainant's opportunity to appeal a decision by the Grievance Committee, granting a right to appeal only if the Dean of the Graduate School disagrees with the Committee's decision.

#### Staff Grievance Procedure

The CGS student filing a complaint of sexual harassment against a staff member (i.e., non-student and non-faculty) employed at any of the Claremont Colleges or the CUC follows the "Staff Grievance Procedure of the Claremont Colleges" (Staff Procedure). Students are directed to the Staff Procedure by an attachment to the Sexual Harassment Policy which lists the applicable procedure for this type of complaint. The CGS Catalog does not contain a notice

explaining the Staff Procedure as it applies to students.

OCR reviewed the Staff Procedure to determine if it met the requirements outlined in section 106.8(b) of the regulations. The Staff Procedure does not state that it is applicable to discrimination complaints. The Staff Procedure focuses on disputes between staff persons. The procedural steps list actions required of the employee/supervisor/department head, Personnel Representative, and Director of Personnel Services. Although the Staff Procedure is supposed to apply to CGS student complaints against staff, there is no inclusion of students in the process, as written. The Staff Procedure requires that an employee present his/her complaint to the supervisor within 10 working days after knowledge of the grievable condition, and lists seven steps, each with a specified time frame for completion. The steps include the following: an informal resolution; a formal grievance; a committee hearing; an investigation; and recommendation to the appropriate College President. The President makes a decision and notifies all parties in writing. The Staff Procedure has no provision for an appeal of the decision.

OCR found the Staff Procedure does not meet the requirements of section 106.8(b). The Procedure is not properly "published" in that, it does not refer to student complainants and how the different procedural steps apply to them and the catalog contains no notice directing students to this procedure. The Staff Procedure also includes elements which are not "equitable". The Staff Procedure does not state that discrimination is a basis for grieving and it does not contain language which includes the student as the grievant. The Staff Procedure does not offer student grievants the right to appeal which denies the parties an equitable resolution. While the Staff Procedure does set a time frame of ten days for filing a grievance, OCR finds the time period to be unreasonably short in the case of a complaint of sex discrimination, including sexual harassment.



### Inter-campus Complaint Resolution

The CGS has a cooperative arrangement with the other five Claremont Colleges. The CGS students may attend functions, take classes, conduct research or serve as teaching assistants to professors at the other colleges. Students and professors from the other colleges can be affiliated with CGS by taking or teaching its graduate courses. Because of the inter-campus relationship, OCR interviewed the Deans of Students from the other five Claremont Colleges to understand how incidents of alleged sexual harassment are handled when they involve student, faculty, and staff from the different colleges. All the Deans stated that inter-campus complaints were reviewed under the grievance procedure at the college where the harasser was employed or enrolled. The Deans from the college of the victim and harasser would cooperate in the investigation of the matter.

However, OCR found that each college has its own grievance procedure for student grievances against other students or faculty and that there is no formal procedure which applies to inter-campus sexual harassment complaints, apart from the Staff Grievance Procedure which applies to all student complaints against staff persons. OCR reviewed the grievance mechanisms of the other five Claremont Colleges which would apply to complaints of sexual harassment by CGS students against a student or faculty member from another campus. OCR found the following problem areas in some of the procedures: no reference of applicability to complaints alleging discrimination, including gender discrimination; insufficient notice that the procedure applies to student grievants from other colleges; unclear filing deadlines; and no opportunity for the grievant to appeal a hearing decision.

OCR also found that CGS does not notify students through its Sexual Harassment Policy, student or staff grievance

procedures, or catalog announcements of what procedure to follow or where to file an inter-campus complaint of sexual harassment against another student or a faculty member.

OCR was informed by CGS that a three-person subcommittee of the Deans of Students from the different Claremont Colleges formed in Fall 1991. The subcommittee was conducting a study to determine the feasibility of developing a uniform sexual harassment policy and grievance procedure for all the Claremont Colleges. The subcommittee submitted a draft of the six-college judiciary process to the Council of Presidents on June 1, 1992. Action on the matter will resume in Fall 1992.

The CGS obligation under section 106.8(b) to adopt and publish grievance procedures providing for the prompt and equitable resolution of student complaints extends to the instances in which CGS students allege sexual harassment by a student or professor of another college. CGS also has responsibilities as a member of an educational consortium under section 106.31(d). CGS students routinely conduct research, serve as teaching assistants and take classes from professors of other Claremont Colleges as a part of their educational program at CGS. Therefore, CGS must notify students of the specific procedure applicable to inter-campus complaints of sexual harassment, and ensure that the applicable procedure meets the "prompt and equitable" standard of section 106.8(b).

OCR found that CGS has not provided students with sufficient notice of the procedure for filing a complaint of sex discrimination, including sexual harassment, against a student or faculty member of another Claremont College. OCR further finds that, in practice, CGS refers such complaints to the college enrolling or employing the alleged offender. However, CGS has failed to ensure that each of the procedures utilized in the other five colleges provide for a

prompt and equitable resolution of a CGS student's complaint, as required by section 106.8(b).

#### NOTICE CONCERNING SEXUAL HARASSMENT ISSUES AND RESOLUTION OF SPECIFIC COMPLAINTS OR INCIDENTS OF SEXUAL HARASSMENT

The OCR review included interviews with a cross section of individuals to determine if the CGS community had an understanding of sexual harassment, if sexual harassment was sufficiently severe or pervasive to create an offensive educational environment, and if CGS responded adequately to reports or knowledge of incidents of sexual harassment. Other than those individuals who reported specific incidents to OCR, as noted below, witnesses interviewed had no reports of sexual harassment occurring at CGS. Most these individuals were knowledgeable about the existence of a grievance procedure and the contact person for filing a sexual harassment grievance. However, many of interviewees expressed a need to have a better understanding of what constituted sexual harassment and how to counsel individuals who might report these problems to them.

The CGS submitted written summaries of three sexual harassment complaints or incidents which occurred within the past three years. One of these complainants filed a formal complaint and OCR met with the complainant. OCR received four other incident reports verbally while on-site and by telephone.

Of the seven complaints/incidents, one was filed formally, four were reported to CGS personnel but handled informally, one was not reported and one is undergoing investigation by CGS after the police investigation was withdrawn. OCR found that, in majority of the incidents reported, the CGS personnel involved acted promptly and pursued

appropriate resolution. In one instance, however, OCR found that the CGS initially failed to follow its own procedures in responding to the report of sexual harassment. In determining whether the CGS has implemented a "prompt and equitable" grievance procedure to address complaints of sex discrimination, OCR examines procedure and its application. In this instance, OCR found that the steps and time frames outlined in the Student Grievance Procedure were not adhered to in processing the student's expressed concern when she initially contacted CGS personnel. The complainant was not advised to file a grievance until almost a year later, when a Academic Dean took responsibility for addressing the complaint. The evidence established that the first three steps of the Procedures were not followed within the lines stipulated in that it took a year before the complainant was offered the option of a formal grievance. OCR finds that the lengthy delays in the grievance steps did not provide for a prompt resolution of the complaint.

However, once the new Academic Dean addressed the complaint, OCR finds that the procedure was adhered to. OCR found that the student was given an extension of the six month filing deadline due to the delay in addressing her concern. However, with regard to this particular complaint, a pre-hearing settlement was offered in a form of a meeting with the accused. The alternative options of the formal grievance hearing process and a meeting were discussed with the complainant subsequent to the filing of her complaint. The grievance was finally settled through a meeting which was mutually agreed upon between the student and the accused.

The facts established that the CGS ultimately resolved this problem when it provided an opportunity to the grievant to file a complaint and to settle prior to hearing. OCR determined that, once the grievance was reexamined, CGS



handled the grievance promptly and equitably. However, the initial delay in the process and failure on the part of CGS to follow its established procedures did not meet the prompt and equitable requirements of section 106.8(b).

#### Conclusion

OCR found CGS had failed to comply with certain procedural requirements of Title IX and its implementing regulations. These areas of non-compliance pertained to the mechanisms the school adopted to address allegations of sexual harassment. While the evidence did not indicate that sexual harassment is a prevalent problem at the CGS, OCR found that the CGS was not in compliance in the areas of its non-discrimination policy, notices to students, and grievance procedures. OCR discussed the compliance review finding with representatives of the CGS and negotiated a corrective action plan sufficient to remedy each area of noncompliance. A copy of the corrective action plan is enclosed as an attachment to this letter. This plan includes action by CGS to amend publication notices and grievance procedures, and to provide ongoing training on the issue of sexual harassment to CGS students, staff and administrators. Based upon this commitment and conditional upon its full implementation, OCR finds the CGS currently in compliance with Title IX as to the issues addressed in this letter.

The findings set forth in this letter pertain exclusively to the specific issues and individuals discussed herein. The findings are not intended, and should not be interpreted to express opinions as to the civil rights compliance of CGS with respect to any other individual or any other issue not discussed in this letter and do not preclude OCR from investigating any future allegation of discrimination.

Under the Freedom of Information Act, it may be necessary to release this document and related records on request. If

OCR receives such a request, it will seek to protect, to the extent provided by law, personal information which, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

We wish to thank you and your staff, especially Ms. Betty Hagelbarger for the cooperation extended throughout this review.

If you have any questions, please contact Pat Shelton, Branch Chief, at (415) 556-7021.

Sincerely,

John E. Palomino  
Regional Civil Rights Director

Enclosure

MAY 5 1989

Mr. and Mrs.

California

(In reply, please refer to Docket Number 09-89-1050)

Dear Mr. and Mrs. :

The Office for Civil Rights (OCR) has completed its investigation of the complaint you filed against the Petaluma City (Elementary) School District and the Petaluma High School District (hereinafter District) alleging discrimination on the basis of sex. Specifically, you alleged that the District discriminated against your daughter, [ ], by failing to stop a group of boys from sexually harassing her.

OCR is responsible for enforcing Title IX of the Education Act of 1973, which prohibits discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. During the period of time applicable to the complaint, the 1987-88 school year, the District received Federal monies which create jurisdiction over the recipient. Because of the receipt of these funds, the District is subject to the requirements of Title IX and to the Departmental regulation implementing Title IX found at 34 C.F.R. Part 106.

OCR acquired information relative to the allegations from you and [ ], from several students and one of their parents, and from the superintendent, the assistant superintendent, the administrators and six of [ ]'s past teachers at Kenilworth Junior High School (KJHS), five other staff people at KJHS, [ ]'s summer school

principal and also [ ]'s current counselor and school psychologist.

OCR found the District in violation of Title IX of the Education Act of 1973. The following material summarizes the legal issues relevant to this investigation and the evidence upon which OCR based its conclusions. At the end of this report is the remedial action to which the District commits itself in order to comply with Title IX. Based upon this commitment, OCR finds the District currently in compliance with Title IX.

#### Investigative Findings and Analysis

##### Findings related to the Procedures of the District

The Regulation implementing Title IX of the Education Act, at 104 CFR Section 106.8(a), requires that recipients designate a responsible employee to coordinate their efforts to fulfill the requirements of Title IX, and to notify students and employees of the existence of the Coordinator. The Superintendent has been designated as the Title IX Coordinator of the District and this fact is published in the annual newsletter which is mailed out to all parents of students in the District and placed in the mailboxes of teachers at school. By these actions the District is in compliance with Section 106.8(a).

Section 106.8(b) also requires recipients to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints relevant to Title IX. The District provided OCR with copies of two grievance procedures which allow students and adults to file Title IX complaints within the District. OCR found that the procedures require complainants, including students, to have specific knowledge regarding the relevant policy and/or statute being violated and that the District has no procedure for publishing the



existence of these grievance procedures.

OCR found that the District grievance procedures placed an undue burden on grievants insofar as they required unsophisticated grievants, including students, to cite specific provisions of statute or policy in support of their grievances. OCR therefore found the District in violation of Section 106.8(b) for failing to adopt an "equitable" grievance procedure, as well as failing to publish these procedures.

Finally, Section 106.9 requires that a recipient notify applicants, students and parents, and employees that it does not discriminate on the basis of sex in its educational programs or activities, and also, that it is required by Title IX not to discriminate in such a manner. The District does notify the parents and staff that it does not discriminate by using the District newsletter. OCR finds the District in compliance with Title IX Section 106.9 in this regard.

#### Findings related to the Issue of Sexual Harassment

You alleged that [ ] was verbally harassed while she was an eighth grader at the KJHS, by a group of 15-20 boys, who taunted her by yelling "Moo, moo" and making blunt and colloquial reference to the size of her breasts. You alleged that that this abuse occurred early in the morning before school, during classes, during lunch time and after school. The complainant states that the harassment began in September of the 1987-88 school year and finally ended sometime during summer school in 1988.

Section 106.31 prohibits a District from denying a student the benefits of, or subjecting a student to discrimination on the basis of sex in any academic, extracurricular, or other program or activity operated by the district. A district may not subject a student to separate or different rules of behavior, sanctions, or other treatment, nor limit a person in the enjoyment of any right, privilege, advantage, or

opportunity on the basis of sex.

Harassment of a student because of his or her sex may have the effect of depriving that student of benefits or of subjecting them to different treatment on the basis of sex. Sexual harassment of a student is generally defined as verbal or physical conduct which is sexual in nature, and which has the purpose or effect of unreasonably interfering with the student's ability to benefit from their education, or of creating an intimidating, hostile or offensive environment. Harassing conduct which is addressed at a student because of their sex, and which has comparable effects on the student, may also constitute sexual harassment. A district which is aware that its students are being subjected to sexual harassment has a duty under Title IX to take prompt and effective action to stop it.

In order to determine whether conduct between students constitutes sexual harassment for which a recipient may be held responsible under Title IX, OCR must consider four elements. First, it must examine whether the student has been harassed, and whether the harassment was based on, or related to, the student's sex. OCR next considers whether the harassment is sufficiently prolonged or severe to interfere with the student's ability to benefit from their education or to create a hostile or offensive environment. Third, it determines whether the recipient knew, or had reason to know, of the harassment. Finally, it examines whether the recipient took prompt and effective action in an effort to stop it.

Based on all of the interviews, OCR has concluded that the harassment did actually occur. In reaching this decision, OCR interviewed all witnesses identified by both you and the District. Many of these witnesses had observed students "mooing" at [ ] in front of the school, in the cafeteria, in the school yard, and in classes. There can be no

doubt that the conduct occurred, and that it continued to occur over the course of more than a year.

OCR further concludes that the harassment was sexual in nature. You and some witnesses, including some students and the summer school principal, stated that that the sounds were expressly intended to refer to [ ]'s bust size.<sup>1</sup> The superintendent also implied the sexual connotation of the boys' teasing [ ] by telling OCR that he had heard that [ ] provoked the harassment by the tight clothes which she wore. (No one else's testimony, nor the OCR investigator's observations, supported this allegation.) While other witnesses did not perceive a direct reference to bust size, all indicated that the "mooing" was a response to [ ]'s body. All of the adults OCR interviewed perceived this harassment as "teasing" rather than sexual harassment, and may not have responded decisively because of this perception. Nevertheless, OCR concludes that sustained references to a student's body in comparison to the body of a cow necessarily constitute verbal conduct of a sexual nature.

OCR also concludes that the harassment created a hostile environment which had an adverse effect on [ ]'s ability to benefit from her education. The harassment clearly upset her. You stated that [ ] was very depressed and even wrote a suicide note. You took [ ] to a psychiatrist for help and then enrolled [ ] in group therapy sessions for girls. The testimony of the noon supervisor and two women teachers indicates that [ ] confided in them, crying about the suffering she felt from the

---

<sup>1</sup> One of the students whom OCR interviewed was obviously embarrassed with the sexual nature of this question and was reluctant to answer. OCR is therefore not sure if all of the students felt comfortable enough to describe the harassment as other than related to being overweight.

harassment. A high school psychologist's report on [ ] states that she reported that she had been teased incessantly about her figure and consequently was having difficulty with peers. Other teachers and counselors reported that [ ] has an ongoing problem of low self-esteem, which they viewed as unrelated to the harassment, and to which they attributed her academic and emotional problems. Without attempting to apportion the reasons for [ ] social or academic difficulties, OCR concludes that the harassment created an environment which found hostile and intimidating, and that it adversely affected her self-esteem and her ability to benefit from the school.

Based on the testimony of the staff, OCR concludes that the District knew about the sexual harassment. Several staff members, including [ ]'s history teacher, the head custodian and a noon supervisor, directly observed the harassment. The assistant principal's testimony indicated that she was aware of the harassment as early as the 1986-87 school year and had witnessed it in the cafeteria and in the school yard. The evidence indicates that the principal was informed of the harassment on least four occasions: once by a substitute, to whom your daughter had complained, once by the head custodian, and twice by you. The knowledge of these individuals created a duty on the part of the District to take action to end the harassment.

OCR concludes that, although the District did respond to reports of the harassment, it failed to take sufficient appropriate action. When confronted with direct evidence that individual students had "mooed" [ ], the principal followed the school's disciplinary policy, verbally reprimanded them, warned them of future suspension for continued violations and enlisted their parents to continue the counseling at home. However, the principal's actions were insufficient to stop the harassment. Although the principal told OCR that he saw each incident of harassment as a "one



time occurrence," he was aware of its continuing nature. The continuity of the harassment should have signaled the principal that the harassment was more serious than implied by a few isolated incidents. The principal assigned the head custodian to watch for the behavior on one day. Beyond that, however, there is no evidence that he followed up on the reports he received by asking school staff to watch for the problem until April or May of 1988, over a year after the assistant principal first became aware of the problem. Nor did the principal check with you or your daughter to ensure that the harassment had stopped.

Mr. [ ] told OCR that he never saw the harassment as sexual harassment but only as teasing. It appears that the assistant principal also treated the harassment as a series of isolated incidents of teasing, and did not coordinate her response to it with that of the principal.

You told OCR that the principal told you that he could not stop junior high school students from "teasing" one another and suggested that you remove [ ] from school for a home education program. The principal denied stating that he could not stop the teasing. However, he neither confirmed nor denied recommending a home program. Your allegation is supported by evidence that a prior victim of sexual harassment at KJHS had managed to escape the harassment only by transferring out of the school. A recommendation for a home program, if it were made, would be particularly inappropriate. It would bring about the end of the harassment only by denying the victim of harassment the benefits of an appropriate educational program while allowing the perpetrators to go without punishment. Moreover, such a recommendation might have violated the requirements of Section 504 of the Rehabilitation Act of 1973, and its implementing regulations, that students who are believed to need special education or related services be evaluated prior to a significant change in placement, and that

they be placed in the regular program to the maximum extent appropriate to their individual needs.

OCR thus concludes that your daughter was subjected to sexual harassment, that the District knew of the harassment, and that, by failing to take prompt and effective action, the District failed to end it. Accordingly, OCR finds that the District subjected [ ] to discrimination on the basis of her sex in violation of Title IX.<sup>2</sup>

The District has agreed to take remedial action which, when implemented, will bring the District into compliance with Title IX. That remedial action is as follows:

1. The District has appointed Ms. Anita Morris, the personnel assistant, as the district-level Title IX Coordinator.
2. Notification of this appointment along with the appropriate contact telephone number will be disseminated in a summer newsletter to be circulated throughout the community in August of 1989 to the residences of all enrolled students in the District, and to all classified and certificated employees.
3. Each junior and senior high school has identified an individual at its school site who shall be responsible for issues related to Title IX.

---

<sup>2</sup>OCR notes that not one administrator, teacher nor other staff person whom OCR interviewed ever interpreted this harassment as sexual harassment and none called or, by their own testimony, even thought of involving the Title IX Coordinator in these incidents. The District has informed OCR that it plans to increase the effectiveness of its Title IX coordination, by appointing a new Title IX Coordinator, by identifying individuals at each school site who shall be responsible for issues related to Title IX, and by publicizing the names and functions of these individuals to parents and staff members.

4. Notification regarding the identification of these responsible people, along with their contact telephone numbers, shall be announced to all staff by memos and/or meetings prior to the end of the 1988-89 school year, and to the respective school communities via school newsletter and bulletins.
5. The Board Policy 4020, Title IX Adult Grievance Procedures: Certificated Grievance Procedures: Certificated/Classified has been amended. The amended policy deletes the reference under Step I that the area of policy and/or statute applicable must be included in the initial written grievance by the grievant.
6. The amended Title IX Student/Parent Grievance Procedures will be submitted to the Petaluma Board of Education in May of 1989. This amended policy deletes the reference under Step I that the area of policy and/or statute applicable must be included in the initial written grievance by the grievant. It was inadvertently omitted from being submitted to the Board with the employee's grievance policy. Should the Board fail to adopt the policy, OCR will immediately reopen the complaint.
7. The District will provide in-service training and development to the staff related to Title IX issues in order to assure greater awareness and sensitivity by all staff and students to sex discrimination on or before November 6, 1989. The training procedures and materials will include: bulletins, newsletters and workshops on November 6, 1989, school site staff meetings during the spring and the fall of 1989, curriculum modifications or changes for the junior

and senior high schools, and counseling regarding traditionally male dominated classes.

8. The presidents of the Petaluma Federation of Teachers and the California School Employees Association have pledged their support to the District to assist in the development and the implementation of the above described in-service training of the District staff.

Based upon the written commitment by the District to fully implement the above corrective actions, OCR finds the District now in compliance with Title IX of the Education Act of 1972. It should be noted that this compliance finding is contingent [sic] adoption of the amended Title IX Student/Parent Grievance Procedures and upon the complete and timely implementation of the necessary corrective actions. In order to determine whether the District has implemented its commitments, OCR requested that the District submit a report, regarding the same issues, to OCR by November 17, 1989.

These findings apply only to the specific issues and circumstances described in this letter and should not be construed as an interpretation of the District civil rights compliance as to any other students or issues.

Under the Freedom of Information Act, it may be necessary to release this document and related records on request. If OCR receives such a request, it will seek to protect, to the extent provided by law, personal information which, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

OCR would like to thank you for your cooperation during the course of this investigation. If you have any questions regarding these findings, please contact Mr. Charles R. Love,



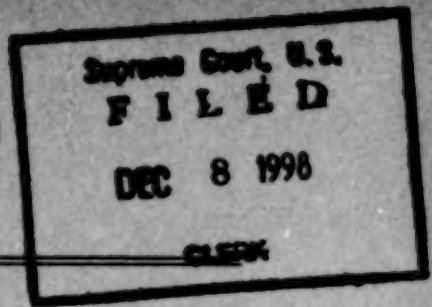
Director, Elementary and Secondary Education Division, at  
(415) 227-8054.

Sincerely,

John E. Palomino  
Regional Civil Rights Director  
Region IX

No. 97-843

13



In The  
**Supreme Court of the United States**  
October Term, 1998

AURELIA DAVIS, as next friend of Lashonda D.,  
*Petitioner,*  
v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,  
*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit

**BRIEF FOR RESPONDENTS**

W. WARREN PLOWDEN, JR.\*  
WILLIAM T. PRESCOTT  
JONES, CORK & MILLER, LLP  
435 Second St., Fifth Floor  
Macon, Georgia 31208-6437  
(912) 745-2821

*Attorneys for Respondents*

*\*Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964  
OR CALL COLLECT (402) 342-2831

**BEST AVAILABLE COPY**

41 PP



**QUESTION PRESENTED**

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which was enacted pursuant to the Spending Clause of Article I of the United States Constitution, encompasses a cause of action against a school district receiving federal funds based upon a claim of student-to-student sexual harassment under a hostile environment negligence theory.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF JURISDICTION.....	1
STATUTE INVOLVED .....	1
STATEMENT OF CASE.....	2
A. Course of Proceeding and Disposition Below...	2
B. Statement of Facts.....	4
SUMMARY OF ARGUMENT.....	5
ARGUMENT AND CITATION OF AUTHORITY....	7
I. The Eleventh Circuit Correctly Held That Title IX Does Not Encompass A Claim Based On Student-to-Student Sexual Harassment .....	8
A. The Plain Language of Title IX Does Not Provide A Cause of Action Against A School District for Student-to-Student Sexual Harassment .....	9
B. The Legislative History of Title IX Does Not Support A Claim For Student-to-Student Sexual Harassment .....	13
II. During the 1992-93 School Year, There Were No Federal Rules or Guidelines on Sexual Harassment in the Primary and Secondary Schools. The Monroe County School District Should Not be Exposed to Damages Suits Based on the Retroactive Application of Federal Guidelines That Did Not Exist Until 1997 .....	17

## TABLE OF CONTENTS – Continued

	Page
A. The Office of Civil Rights Never Notified the Nation's Public Schools Until 1997 That Title IX Covered Student-to-Student Misconduct. ....	17
B. The Office of Civil Right's Sexual Harassment Guidance Deserves No Deference Because it was Created For Purposes of Litigation, 25 Years After Passage of Title IX.....	20
C. The Office of Civil Rights Sexual Harrassment Guidance May Not Be Applied Retroactively to Create a Damages Claim Where None Previously Existed .....	21
D. The Office of Civil Rights Sexual Harassment Guidance Applies an Incorrect Legal Standard.....	22
III. This Court's Decisions In Franklin v. Gwinnett County Pub. Sch., and Gebser v. Lago Vista Ind. Sch. Dist. Do Not Support Finding A Cause Of Action Under Title IX For Student-to-Student Sexual Harassment .....	24
IV. Title VI Principles Should Be Applied In Determining Liability Under Title IX And Do Not Support A Claim for Student-to-Student Sexual Harassment .....	26
CONCLUSION .....	29
APPENDIX A .....	A-1



## TABLE OF AUTHORITIES

## Page

## CASES

<i>Batteron v. Francis</i> , 432 U.S. 416 (1977) .....	21
<i>Board of Educ. v. Harris</i> , 622 F.2d 599 (2d Cir. 1979), cert. denied, 449 U.S. 1124 (1981) .....	21
<i>Bougher v. University of Pittsburgh</i> , 713 F. Supp. 139 (W.D. Pa. 1989) .....	25, 26
<i>Bowen v. Georgetown Univ. Hosp.</i> , 488 U.S. 204 (1988) .....	22
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979) ....	26
<i>Captino v. Secretary of Health &amp; Human Servs.</i> , 723 F.2d 1066 (2nd Cir. 1984) .....	21
<i>Davis v. Monroe County Bd. of Educ.</i> , 120 F.3d 1390 (11th Cir. 1997) .....	4, 14, 16
<i>Davis v. Monroe County Bd. of Educ.</i> , 74 F.3d 1186, vacated and reh'g en banc granted, 91 F.3d 1418 (11th Cir. 1996) .....	3, 11, 25
<i>Davis v. Monroe County Bd. of Educ.</i> , 862 F. Supp. 363 (M.D. Ga. 1994) .....	2
<i>DeShaney v. Winnebago County Dept. of Soc. Servs.</i> , 489 U.S. 189 (1989) .....	2, 27
<i>Doe v. Petaluma City Sch. Dist.</i> , 830 F. Supp. 1560 (N.D. Cal. 1993), reconsidered and revised, 949 F. Supp. 1415 (N.D. Cal. 1996) .....	18
<i>Elston v. Talladega County Bd. Of Educ.</i> , 997 F.2d 1394 (11th Cir. 1993) .....	26
<i>Franklin v. Gwinnett County Pub. Sch.</i> , 503 U.S. 60 (1992) .....	6, 21, 24, 25, 26

## TABLE OF AUTHORITIES - Continued

## Page

<i>Gebser v. Lago Vista Ind. Sch. Dist.</i> , 520 U.S. 397 (1998) .....	6, 12, 23, 25, 26, 28
<i>Grove City College v. Bell</i> , 465 U.S. 555 (1984) .....	15
<i>Guardians Ass'n v. Civil Service Comm'n.</i> , 463 U.S. 582 (1983) .....	10, 26, 27
<i>Hishon v. King &amp; Spalding</i> , 467 U.S. 69 (1984) .....	8
<i>Kelly v. EPA</i> , 15 F.3d 1100 (D.C. Cir. 1994) .....	19, 20
<i>Landgraf v. USI Film Products</i> , 511 U.S. 244 (1994) ....	22
<i>Meritor Savings Bank v. Vinson</i> , 477 U.S. 57 (1986) ....	24
<i>Monteiro v. Tempe Union High Sch. Dist.</i> , No. 97-15511, 1998 WL 727338 (9th Cir. Oct. 19, 1998) .....	28
<i>North Haven Bd. Of Educ. v. Bell</i> , 456 U.S. 512 (1982) .....	9, 16, 20
<i>Oncale v. Sundowner Offshore Services, Inc.</i> , ___ U.S. ___ 118 S. Ct. 998, 140 L.Ed.2d 201 (1998) .....	28
<i>Pennhurst State School and Hospital v. Halderman</i> , 451 U.S. 1 (1981) .....	10, 24
<i>Rosa H. v. San Elizario Indep. Sch. Dist.</i> , 106 F.3d 648 (5th Cir. 1997) .....	21
<i>Rowinsky v. Bryan Ind. Sch. Dist.</i> , 80 F.3d 1006, cert. denied, ___ U.S. ___, 117 S. Ct. 165, 136 L.Ed. 2d 108 (1996) .....	passim
<i>Skidmore v. Swift</i> , 323 U.S. 134 (1944) .....	21
<i>Smith v. Metro Sch. Dist.</i> , 128 F.3d 1014 (7th Cir. 1997) .....	21
<i>United States v. Fordice</i> , 505 U.S. 717 (1992) .....	26

## TABLE OF AUTHORITIES - Continued

	Page
<i>University of California Regents v. Bakke</i> , 438 U.S. 265 (1978) .....	26
<i>Wolpow v. Commissioner of Internal Revenue</i> , 47 F.3d 787 (6th Cir. 1995) .....	19
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975) .....	13
<i>Wright v. Director, Fed. Emergency Mgmt. Agency</i> , 913 F.2d 1566 (11th Cir. 1990) .....	22

## STATUTES

20 U.S.C. § 1254(1) .....	1
Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 .....	<i>passim</i>
20 U.S.C. § 1982 .....	22
42 U.S.C. § 1983 .....	2, 3
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ....	22, 23, 24
Title VI of the Civil Rights Act of 1965, 42 U.S.C. § 2000d et seq. ....	<i>passim</i>
Civil Rights Restoration Act of 1988, 20 U.S.C. § 1687 .....	16

## RULES

Fed.R.Civ.P. 12(b)(6) .....	1, 4, 7
-----------------------------	---------

## REGULATIONS

34 C.F.R. §§ 106.01-106.61 .....	18, 27
34 C.F.R. § 106.2(h) .....	11

## TABLE OF AUTHORITIES - Continued

	Page
34 C.F.R. § 106.31(b) .....	23
61 Fed. Reg. (1996): p. 42,728 .....	17
62 Fed. Reg. (1997) p. 12,038 .....	23
p. 12,039 .....	18, 23
p. 12,041 .....	23
p. 12,042 .....	23

## LEGISLATIVE HISTORY

118 Cong. Rec. 5803 (1992) .....	14, 15
118 Cong. Rec. 5808 (1992) .....	15
118 Cong. Rec. 5812 (1992) .....	15

## MISCELLANEOUS

OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (August 31, 1981) .....	18
"Sexual Harassment: It's Not Academic" (OCR pamphlet, August 1984) .....	18
Letter of Stacey Roseberry, Attorney Advisor, Ele- mentary and Secondary Education Policy Divi- sion, Office of Civil Rights (Nov. 12, 1993) .....	19
Letter of Findings by Kenneth Miles, Regional Civil Rights Director, Region V (April 27, 1993) ....	19
Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IV (July 24, 1992) ....	19



## TABLE OF AUTHORITIES - Continued

	Page
Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IX (May 5, 1989) . . . .	19
K. Davis, ADMINISTRATIVE LAW TREATISE 17 (3d ed. 1994) . . . . .	19

## STATEMENT OF JURISDICTION

Petitioner filed her Petition for Writ of Certiorari seeking review of the Eleventh Circuit Court of Appeals' judgment affirming the district court's order dismissing Petitioner's complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim for which relief may be granted under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1254(1).

---

 STATUTE INVOLVED

This case involves a question of first impression under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* The Court is being asked to determine whether the following provision of Title IX encompasses a damage claim against a school district for student-to-student sexual harassment based upon a hostile environment negligence theory:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

---

## STATEMENT OF THE CASE

### A. Course of Proceeding and Disposition Below

Petitioner Aurelia Davis a/n/f of LaShonda D. filed a complaint against the Monroe County Board of Education, the superintendent of schools, and an elementary school principal alleging claims under 42 U.S.C. § 1983 and Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.* Pet. App. at 93a. The complaint alleged that Petitioner's daughter had been subjected to a sexually hostile environment by a fellow fifth-grade student at Hubbard Elementary School. It further alleged that the incidents of sexual harassment had been reported to her daughter's teachers and the principal, and that no action or insufficient action was taken in response to her complaints. Pet. App. at 95a-98a.

Respondents moved to dismiss, contending that Petitioner's complaint failed to state a claim for which relief could be granted under either Title IX or § 1983 (Record 12). The district court dismissed Petitioner's § 1983 claim finding that under the Supreme Court's decision in *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989). Respondent's had no constitutional duty to protect LaShonda from the actions of a third party absent the existence of a special relationship. *Davis v. Monroe County Bd. of Ed.*, 862 F. Supp. 363, 364-65 (M.D. Ga. 1994). Pet. App. at 87a.

The district court further held that Petitioner's Title IX claim had no basis in law because Petitioner did not allege that the Board had any role in the harassment and that the sexually harassing behavior of a fellow fifth

grader was not part of an education program or activity receiving federal aid, *Id.* at 88a. Petitioner appealed.

A three-judge panel of the Eleventh Circuit Court of Appeals unanimously affirmed the dismissal of Petitioner's § 1983 claims without discussion, *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1189 (11th Cir. 1996) *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996). Pet. App. at 62a-63a. A divided panel reversed the district court's finding that Title IX did not provide a cause of action for student-to-student sexual harassment based upon a hostile environment negligence theory, and held that "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment." *Id.* at 73a.

Judge Birch dissented from the majority's holding stating that the majority made an "unprecedented extension in holding that Title IX encompasses a claim of hostile environment sexual harassment based on the conduct of a student." *Id.* at 79a. He argued that the language of Title IX does not indicate that such a cause of action was intended to be covered by its scope. *Id.*

Judge Birch further argued that even if Title IX encompasses student-to-student sexual harassment, it should only cover intentional conduct on the part of the school board rather than a claim for negligent failure to intervene to prevent sexual harassment as alleged by Petitioner. *Id.* at 80a. Finally, Judge Birch argued that the remedy available for unintentional violations of Title IX should be limited to injunctive relief based upon this Court's precedents holding that Title VI (and therefore



Title IX) does not support a monetary damages remedy for unintentional discrimination. *Id.*

Respondents filed a Suggestion of Rehearing En Banc with respect to the Petitioner's Title IX claims which was granted by the Eleventh Circuit on August 1, 1996, vacating the panel's opinion. Pet. App. at 91a. Subsequently, the Eleventh Circuit sitting *en banc* affirmed the district court's dismissal of Petitioner's complaint finding that the Title IX, which was enacted by Congress pursuant to its spending power, did not provide school districts with notice that they would be liable in monetary damages for the actions of one student toward another student in the language of Title IX or its legislative history. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997). Pet. App. at 33a.

#### B. Statement of Facts

Because Petitioner's complaint was dismissed pursuant to Fed.R.Civ.P. 12(6), the factual record has not been developed. Petitioner's complaint alleged that beginning on or about December 17, 1992 and continuing through May 19, 1993, Petitioner's daughter LaShonda was harassed by a fellow fifth grade student and classmate, G.F. Pet. App. at 95a-96a. The alleged harassment consisted of repeated attempts by G.F. to touch LaShonda's breasts and vaginal area, vulgar language by G.F. directed toward LaShonda, (e.g., "I want to get in bed with you" and "I want to feel your boobs"), placing a door stop in his pants and behaving in a sexually suggestive manner toward LaShonda, and rubbing his body against LaShonda's in what LaShonda felt was a sexually suggestive way while walking to lunch. *Id.* The complaint

alleges that each incident was reported to a teacher supervising the classroom. *Id.*

The complaint alleged that LaShonda's assigned seat in Diane Fort's class was next to G.F.'s seat and that despite LaShonda's requests, she was not allowed to change seats for over three months. Pet. App. at 97a. The complaint further alleged that G.F. was subsequently charged with and pled guilty to sexual battery. *Id.* Petitioner's complaint asserts that the "harassment" was detrimental to LaShonda's mental health and affected her ability to concentrate on her school work resulting in a decline in LaShonda's grades. *Id.*

Finally, Petitioner's complaint alleges that G.F. was not suspended, kept away from LaShonda, or disciplined after repeated complaints by LaShonda and her mother. *Id.* However, G.F. was suspended for slapping another child who was white. Pet. App. at 98a. Petitioner's complaint also alleged that G.F. had sexually harassed other girls in the class.

---

#### SUMMARY OF ARGUMENT

The Eleventh Circuit correctly held that Title IX does not encompass a claim based on a school official's alleged failure to take reasonable action to remedy student-to-student sexual harassment. Since Title IX was enacted pursuant to Congress' spending power, Congress must unambiguously set forth all conditions placed on a grant recipient in order to provide notice to the recipient of its obligations. Nothing in the language of Title IX put Respondents on notice that they could be held liable in damages for student-to-student sexual harassment.

Nor does the legislative history of Title IX support a claim for student-to-student sexual harassment. The legislative debate surrounding the enactment of Title IX focused on acts by grant recipients and did not address sexual harassment or student-to-student sexual harassment.

Additionally, the Department of Education Office of Civil Rights' Sexual Harassment Guidance is not entitled to deference from this Court because it was not in existence at the time that the incidents alleged in Petitioner's complaint took place and cannot be applied retroactively. Further, the Office of Civil Rights' Sexual Harassment Guidance was created for purposes of litigation. The only policy guidance in existence from the Office of Civil Rights at the time of the incidents alleged by Petitioner did not address student-to-student sexual harassment. Finally, the Office of Civil Rights' Sexual Harassment Guidance applies an incorrect Legal Standard.

This Court's decisions in *Gebser v. Lago Vista Ind. Sch. Dist.*, 520 U.S. 397 (1998) and *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) do not support finding a cause of action for student-to-student sexual harassment under Title IX. These decisions reaffirm that Congress must provide recipients of federal funds with unambiguous notice of the conditions attached to the acceptance of such funds before they can be held liable in damages. Contrary to Petitioner's argument, in *Gebser* and *Franklin* this Court never discussed the issue of whether educational institutions can be held liable for student-to-student sexual harassment. Moreover, a proper reading of both cases militates against a finding

that Title IX encompasses a claim for student-to-student sexual harassment.

Title VI principles should apply to this case and do not support a claim for student-to-student sexual harassment. Title VI of its own force reaches no further than the constitution. Title IX is to be construed like Title VI. Accordingly, like Title VI, Title IX reaches no further than the Constitution in the absence of regulations extending its reach to impact discrimination. No regulations have been enacted under Title IX addressing student-to-student sexual harassment or hostile environment sexual harassment. Consequently, Title IX reaches no further than the Constitution. Inasmuch as Respondents had no constitutional duty to protect LaShonda from the harassing conduct of a fellow student, they had no such duty under Title IX.

Moreover, Title IX was enacted pursuant to the Congress's Spending Clause Power and therefore compensatory damages are only available for intentional violations. Petitioner's complaint alleged only a negligent failure to act and therefore fails to state a claim.

---

#### ARGUMENT AND CITATION OF AUTHORITY

The standard of review for a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is the same in this Court as in the district court. The Court in considering a motion to dismiss may look only at the pleadings, accepting all facts pleaded therein as true and viewing all reasonable inferences in a light most favorable to the plaintiff. A complaint should be dismissed if the plaintiff can prove no



set of facts entitling him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Applying this standard to the facts of this case, the Eleventh Circuit correctly affirmed the district court's dismissal of Petitioner's complaint.

**I. The Eleventh Circuit Correctly Held That Title IX Does Not Encompass A Claim Based On Student-to-Student Sexual Harassment**

In Count I of her complaint Petitioner alleges that:

The persistent sexual advances and harassment by the student G.F. upon Plaintiff interfered with her ability to attend school and perform her studies and activities. Had Defendant Bill Querry intervened as was necessary, the injury to LaShonda would have been mitigated and the situation would have ended . . . the deliberate indifference by Defendants to the unwelcomed sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abusive school environment in violation of Title IX of Education Amendments of 1972. . . . Pet. App. at 100a.

Petitioner contends that Respondents' alleged failure to protect LaShonda from the sexually harassing actions of a fellow student created a hostile environment and states a claim for damages under Title IX. Petitioner is wrong.

In affirming the district court's dismissal of Petitioner's Title IX claim the Eleventh Circuit held, " . . . an enactment under the Spending Clause must unambiguously disclose to would-be recipients all facts material to their decision to accept Title IX funding. The threat of whipsaw liability in a substantial number of cases

would materially affect a Title IX recipient's decision to accept federal funding, yet Congress did not provide unambiguous notice of this type of liability in the language or the history of the statute." *Davis*, 120 F.3d. at 1406. Contrary to Petitioner's assertions, the Eleventh Circuit's holding is supported by the plain language and legislative history of Title IX and the prior decisions of this Court.

**A. The Plain Language of Title IX Does Not Provide A Cause Of Action Against A School District For Student-to-Student Sexual Harassment**

As with any statute, the starting point in determining the scope of Title IX is its statutory language. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982). Title IX provides in relevant part:

No person in the United States shall, on the basis of sex, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). Title IX does not *expressly* create a cause of action for hostile environment sexual harassment based upon the conduct of one student toward another student. *Rowinsky v. Bryan Ind. Sch. Dist.*, 80 F.3d 1006 (6th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 165 (1996). Neither should the statute be interpreted so as to *imply* such a cause of action.

Title IX is a funding statute enacted pursuant to Congress's spending power. *Id.* "As an exercise of Congress's spending power, Title IX makes funds available to a recipient in return for the recipient's adherence to the conditions of the grant." *Id.* at 1012-13. In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), this Court held that "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' . . . There can, of course be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." 451 U.S. at 17. Thus, if Congress is going to put a condition on the grant of federal money, it must do so "unambiguously." *Id.* This Court reasoned that because the recipient of federal aid voluntarily consents to accept the aid and consequent federal requirements, the recipient should not be held liable for compensatory relief absent notice that it is committing some act in violation of the federal requirements. *Guardians, Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983).

Contrary to Petitioner's assertions, by its plain language, Title IX prohibits discriminatory acts only by grant recipients. *Rowinsky*, 80 F.3d at 1012. Under Title IX, recipient means:

Any state or political subdivision thereof, or any instrumentality or a state or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such

assistance including any subunit, successor, assignee or transferee thereof.

34 C.F.R. § 106.2(h). The definition of recipient does not include students. Nothing in the language of Title IX would put a recipient on notice that by accepting federal funds, it was opening itself up to unlimited liability for the actions of a student or third party individuals. Judge Birch recognized this in his dissent from the vacated panel opinion in this case wherein he stated:

There is no indication in the language of Title IX that such a cause of action [student-to-student sexual harassment] was intended to be covered by its scope; rather, the statute states that '[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving federal financial assistance.' In this case, the school board . . . is not alleged to have committed any act of harassment against LaShonda nor is any employee of the school board. Rather, the Plaintiff seeks to hold the school board liable for negligently failing to protect another student, not its employee, from sexually harassing LaShonda. In my opinion, this student-on-student sexual harassment case clearly falls outside of the purview of Title IX.

*Davis v. Monroe*, 74 F.3d at 1196. As the Fifth Circuit noted in *Rowinsky*, "[i]mposing liability for the acts of third parties would be incompatible with the purpose of a spending condition because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of Title IX." *Rowinsky*, 80 F.3d at 1013. The Fifth Circuit held "[t]hus, the structure of Title IX supports the conclusion that the



spending conditions apply only to the conduct of grant recipients." *Id.*

Title IX is an anti-discrimination statute: "No person . . . shall . . . be subjected to discrimination. . . ." In recognition of this fact this Court held in *Gebser* that "Title IX focuses on protecting individuals from discriminatory practices carried out by recipients of federal funds," *Gebser*, \_\_\_ U.S. at \_\_\_, 118 S. Ct. at 1997, and "that Title IX was designed 'primarily' to prevent recipients of federal financial assistance from using the funds in a discriminatory manner." *Id.* at 2000. Thus, it is clearly the actions of recipients that Title IX was designed to address. Petitioner does not contend that G.F. was a recipient of federal funds as defined by Title IX. Rather, Petitioner makes the disingenuous argument that the statute focuses on the harm done to the individual in the educational program, not the identity of the person whose initial actions caused the discrimination with which it is confronted. Petitioner's argument is clearly not supported by the language of Title IX. Title IX simply says that if a school district elects to accept federal funding then it, the school district, shall not discriminate against an individual in its educational programs on the basis of sex. Nowhere in Title IX is a recipient of federal funds put on notice that it could be held liable in money damages for the action of one student toward another student.

Moreover, at the time Petitioner filed her complaint, no court, including this Court had recognized the concept of sexual harassment in any context other than the employment context. Nor had any Court extended the

concept of sexual harassment to the misconduct of emotionally and socially immature children. The type of conduct alleged by Petitioner in her complaint is not new. However, in past years it was properly identified as misconduct which was addressed within the context of student discipline. The Petitioner now asks this Court to create out of whole cloth a cause of action by labeling childish misconduct as "sexual harassment," to stigmatize children as sexual harassers, and have the federal court system take on the additional burden of second guessing the disciplinary actions taken by school administrators in addressing misconduct, something this Court has consistently refused to do. *Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("It is not the role of the court to set aside decisions of school administrators which the court may view as lacking basis in wisdom or compassion.") While this Court has previously held that Title IX should be given a scope as broad as its language, that scope is not without limitations. The plain language of Title IX simply does not contemplate the cause of action which Petitioner asks this Court to create.

#### **B. The Legislative History of Title IX Does Not Support A Claim For Student-to-Student Sexual Harassment**

While Petitioner spends much time in her brief quoting testimony during the legislative debates surrounding Title IX and failed attempts to narrow its scope, Petitioner does not dispute in her brief, that the issues of student-to-student sexual harassment and discipline were not raised during the legislative process. Indeed, as Petitioner notes in her brief, hostile environment sexual harassment

was not recognized as a form of sex discrimination at the time Title IX was enacted. Moreover, this Court did not address the concept of sexual harassment under Title IX until this year. Thus, it cannot reasonably be argued that Congress could have intended that Title IX would encompass a claim for student-to-student sexual harassment or that school districts were on notice that by accepting federal funds under Title IX they were accepting liability for the actions of a third party.

As the Eleventh Circuit correctly noted, the House Subcommittee on Education's work focused on eliminating gender discrimination in school admissions and in the employment decisions of school administrators. *Davis*, 120 F.3d at 1396. Nowhere in the long process of enacting Title IX was the issue of student-to-student sexual harassment considered or discussed.

Moreover, in *Rowinsky*, the Fifth Circuit examined the legislative history of Title IX and correctly read it to support limiting the statute to the practices of grant recipients citing the fact that "both supporters and opponents" of the legislation focused exclusively on acts by the grant recipients. *Id.*, 80 F.3d at 1014, citing 118 Cong. Rec. at 5803 (1992). During the Senate debate on Title IX Senator Bayh stated that:

... we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever. . . . While the impact of this

amendment would be far-reaching, it is not a panacea.

118 Cong. Rec. at 5808, 5812. Senator Bayh described the heart of amendment as "a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions." *Id.* at 5803. Further, as the Fifth Circuit noted, the original amendment mandated a study of sex discrimination in order to suggest further legislative remedies. *Id.* Implicit in the mandate of such a study is a recognition that Title IX did not and was not intended to address every situation and might have to be amended at some later date.

Petitioner's reliance on the examples of discrimination in the regulations in support of her position is misplaced. It is clear from a cursory reading of the examples that they address the responsibility of recipients of federal funds when contracting with outside agencies or entities to provide services to their students. Nowhere in the regulations is a situation analogous to that which is before the Court discussed. Respondents had no contractual relationship with G. F. to provide educational services to LaShonda. Thus, the Title IX regulations relied on by Plaintiff to extend the reach of Title IX to student-to-student sexual harassment are inapposite.

As Petitioner points out in her brief, Congress has previously acted to overrule this Court's ruling in *Grove City College v. Bell*, 465 U.S. 555 (1984) which limited the application of Title IX to the particular program or activity receiving federal funds. If Congress had desired to



amend Title IX to cover peer sexual harassment it could easily have done so. Petitioner asserts in her brief that Congress heard testimony regarding student-to-student harassment in connection with the Civil Rights Restoration Act of 1988. Thus, if Congress had desired to amend Title IX to include a claim for student-to-student sexual harassment it could have done so at that time. Congress did not do so.

If Title IX is to encompass a claim for damages against school districts for student-to-student sexual harassment, it should be left to Congress, to state explicitly that Title IX should cover such a claim. As this Court has observed, "... policy considerations are for Congress to weigh and we are not free to ignore the language and history of Title IX even if we were to disagree with the legislative choice." *North Haven*, 456 U.S. at 535 n.26.

Congress should have the opportunity to weigh the implications of creating such a cause of action, the standard for proving such a claim, the damages that would be available, and the social ramifications of creating a cause of action which makes school districts liable for the actions of children. As the Eleventh Circuit noted nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages. *Davis*, 120 F.3d at 1402.

As a consequence, the accused student's right to due process will be implicated creating other legal and financial concerns for school districts. If school districts are going to be placed under such a burden, it should be left to Congress to say so through the legislative process.

## **II. During the 1992-93 School Year, There Were No Federal Rules or Guidelines on Sexual Harassment in the Primary and Secondary Schools. The Monroe County School District Should Not be Exposed to Damages Suits Based on the Retroactive Application of Federal Guidelines That Did Not Exist Until 1997.**

### **A. The Office for Civil Rights Never Notified the Nation's Public Schools Until 1997 That Title IX Covered Student-To-Student Misconduct.**

The Brief of the United States criticizes the School District for not having a "sexual harassment" policy during the 1992-93 school year and for not giving its employees "guidance" on how to respond to student complaints. (U.S. Brief at 4.) This criticism is ironic and unfair because, during the time in question, the U.S. Department of Education itself never informed the nation's public schools that Title IX covered "sexual harassment" among students.<sup>1</sup> The Department never gave any guidance until August 1996 when it published a draft of a brand new policy guidance that interpreted Title IX to include a prohibition against "sexual harassment" among primary and secondary school students, *See* 61 Fed. Reg. 42,728 (Aug. 14, 1996). Those guidelines

---

<sup>1</sup> The criticism also overlooks the fact that every school district prohibits assaults, vulgarity, and other misconduct. Application of the label "sexual harassment" with respect to children is a recent phenomenon of little real utility. Schools punish specific acts of misconduct, not labels.

were not finalized and distributed to the nation's school superintendents until March, 1997. See Office for Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12039 (1997).

Prior to the issuance of the OCR Guidance, school superintendents relied on the Department's Title IX regulations, which were and are completely silent on the subject of "Sexual Harassment." See 34 C.F.R. §§ 106.01-106.61 (1995). In contrast, the regulations provide explicit detail concerning the administration of athletics, admissions policies, housing and the like. *Id.*

The earliest publications of the Department's Office for Civil Rights show that OCR never addressed (i) harassment in the primary and secondary schools or (ii) student-on-student sexual harassment. Perhaps reflecting Title IX's origin as a statute to end discrimination in higher education, OCR did look at harassment by *university professors*. See, e.g., OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981); "Sexual Harassment: It's Not Academic" (OCR pamphlet, August 1984).

The first reported case<sup>2</sup> involving student-on-student misconduct under Title IX did not appear until August 30, 1993—after LaShonda's alleged problems at Hubbard Elementary School. In November 1993, again after

<sup>2</sup> *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1573 (N.D. Cal. 1993), reconsidered and revised, 949 F. Supp. 1415 (N.D. Cal. 1996).

LaShonda's alleged complaints, OCR was still telling public schools that it had no policy guidance addressing the unique environment of the public schools or the unique issue of student-on-student misbehavior. See Appendix A, letter of Stacey Roseberry, Attorney Advisor, Elementary and Secondary Education Policy Division, Office for Civil Rights (Nov. 12, 1993). The Petitioner suggests that three OCR "letter findings" from 1989, 1992, and 1993<sup>3</sup> support her argument that all school districts were on notice that Title IX covered student-on-student sexual harassment. The letters were not distributed to other school districts. The three letters in question were authored by regional OCR staff members in connection with three specific investigations and are not accorded the deference owed to agency-wide regulations.<sup>4</sup> Significantly, these three letters were written before the non-committal letter that the national office of OCR wrote in November 1993.

<sup>3</sup> Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IV (July 24, 1992); Letter of Findings by Kenneth Miles, Regional Civil Rights Director, Region V (April 27, 1993); Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IX (May 5, 1989).

<sup>4</sup> See generally *Rowinsky*, 80 F.3d at 1015 (OCR investigation letters were not owed deference); *Wolpow v. Commissioner of Internal Revenue*, 47 F.3d 787, 791 (6th Cir. 1995) (case-specific interpretation taken in litigation obtains no deference); *Kelly v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1984) (deference to agency's interpretation as "prosecutor" was inappropriate); K. Davis, *ADMINISTRATIVE LAW TREATISE* 17 (3d ed.1994) (level of deference depends on whether the rule was authored by the agency or merely a member or portion of the agency's staff).



**B. The Office for Civil Right's Sexual Harassment Guidance Deserves No Deference Because it was Created For Purposes of Litigation, 25 Years After Passage of Title IX.**

Both the Petitioner and the United States suggest that the Department of Education has had a "longstanding" position concerning liability for sexual harassment in the primary and secondary schools. This conclusion is unsupportable. The Sexual Harassment Guidance issued in March 1997 by the Office for Civil Rights represents a new position. While agency interpretations of a statute are entitled to deference if they are "longstanding," *North Haven Board of Education v. Bell*, 456 U.S. 512, 522 n.11 (1982), where the agency's position has not been demonstrably consistent over time or is unclear, then the interpretation is not owed deference. See *Id.* at 522 n.11 and 538 n.29.

The OCR Guidance deserves no deference because it was written for purposes of litigation. The first draft of the Guidance was published on August 14, 1996—just in time for inclusion in an amicus brief filed that same week in this Court in another Title IX case, *Rowinsky v. Byran Indep. Sch. Dist.* The agency refused public comment on the substance of the draft Guidance. See 61 Fed. Reg. 42728 (Aug. 14, 1996).<sup>5</sup> The agency's apparent rush to create Guidance in time for filing with this Court in *Rowinsky*, combined with the agency's refusal to take public comment, undercuts any deference argument. See, e.g., *Kelly v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994)

<sup>5</sup> See Brief of United States in No. 96-4, p.2 & 11 (August 1996).

(agency's interpretations for purposes of litigation deserve no deference).

Moreover, the other usual factors supporting deference—including contemporaneous adoption with the statute, agency expertise, and formality—are entirely missing in this instance. See generally *Smith v. Metro. Sch. Dist.*, 128 F.3d 1014, 1033-34 (7th Cir. 1997) (declining to defer to the OCR Guidance because it was neither a regulation nor an interpretation of a regulation); see also *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (listing deference factors); *Batteron v. Francis*, 432 U.S. 416, 425 n.9 (1977) (timing of the agency's position is a factor as is agency's expertise over the subject matter); *Board of Educ. v. Harris*, 622 F.2d 599 (2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981) (declining to defer to agency position that did not involve agency's expertise).

OCR expertise is irrelevant to the question of when damages are available under Title IX, "a function clearly within the purview of judicial competence," *Captino v. Secretary of Health & Human Servs.*, 723 F.2d 1066, 1075 (2nd Cir. 1984). Nor has the Department's position on damages under Title IX been consistent. During this Court's consideration of *Franklin v. Gwinnett County Pub. Sch.*, the United States filed an amicus brief opposing money damages for any Title IX claims.

**C. The OCR Guidance May Not Be Applied Retroactively to Create a Damages Claim Where None Previously Existed.**

The OCR Guidance should not be applied retroactively to impose damages liability against school districts. See *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648,

658 (5th Cir. 1997) (Department of Education "cannot modify past agreements with [federal grant] recipients by unilaterally issuing guidelines through the Department of Education"); see also *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (conduct ordinarily should be assessed under the law that existed when the conduct took place). The OCR Guidance fails to provide a clear statement of retroactive intent, and Title IX itself contains no language authorizing the Department of Education to promulgate retroactive rules. See 20 U.S.C. § 1682. A general grant of rulemaking authority does not constitute authority to promulgate retroactive rules. See *Wright v. Director, Fed. Emergency Mgmt. Agency*, 913 F.2d 1566, 1572 (11th Cir. 1990); see also *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 213 (1988) (agency's power is limited to authority delegated by Congress).

#### **D. The OCR Guidance Applies an Incorrect Legal Standard.**

The OCR Guidance is not entitled to deference for the further reason that it applies an incorrect legal standard. Although it is not entirely clear, the OCR Guidance seems to adopt Title VII legal principals governing sexual harassment in the workplace and attempts to make them applicable to school districts throughout the country. According to the OCR Guidance, schools are liable for failing to eliminate:

sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature) . . . by another student . . . that is sufficiently severe, persistent,

or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.

62 Fed. Reg. 12,038. Moreover, the OCR Guidance warns administrator's that they may cause the school district to violate Title IX if they fail to exercise "due care" in discovering misconduct. *Id.* at 12,042. In addition, the OCR Guidance erroneously informs school districts that a single act of student harassment can cause a hostile environment and warns that in some instances nonsexual conduct may take on sexual connotations and may rise to the level of sexual harassment. *Id.* at 12,039, 12,041. This Court in *Gebser* has already rejected the application of Title VII legal principles to Title IX cases involving teacher-student sexual harassment. *Gebser*, \_\_\_ U.S. at \_\_\_, 118 S. Ct. at 1997-99. Thus, the OCR Guidance clearly attempts to extend the reach of Title IX beyond its scope as determined by its plain language, its regulations, and the holdings of this Court. As the Fifth Circuit noted in *Rowinsky*, OCR has no jurisdiction over sexual harassment by third parties unless the power of the school district is somehow implicated by the third party because 34 C.F.R. § 106.31(b) only prohibits discrimination by grant recipients. *Rowinsky*, 80 F.3d at 1015.

Accordingly, the OCR Guidance provided no guidance to the School District in this case or to school districts in future cases.



### III. This Court's Decisions In *Franklin v. Gwinnett County Pub. Sch.*, and *Gebser v. Lago Vista Ind. Sch. Dist.* Do Not Support Finding A Cause Of Action Under Title IX For Student-To-Student Sexual Harassment

Petitioner and *amicus curiae* contend that *Franklin v. Gwinnett County Pub. Sch.*, supports an "occurs in" theory by finding that the school district had a duty under Title IX to prevent the alleged sexual harassment of LaShonda by G.F. In *Franklin*, this Court stated:

Unquestionably, Title IX placed on the Gwinnett County Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminates" on the basis of sex.' *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404, 91 L.Ed.2d 49 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe.

*Franklin*, 503 U.S. at 75. (*emphasis added*). The comment quoted above was made by this Court in explaining its refusal to apply its holding in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), which limits the remedies available under Spending Clause statutes when the alleged violation was unintentional to equitable relief. The Court did not compare Title IX and Title VII, did not define the standard of liability under Title IX for acts of agents (much less non-agents) and never used the phrase "hostile environment." The sole issue before the Court in

*Franklin* was whether compensatory relief was available under Title IX for intentional conduct. As the Supreme Court noted in *Franklin*, "[t]he question of what remedies are available under a statute that provides a private right of action is analytically distinct from the issue of whether such a right exists." *Franklin*, 503 U.S. at 65-66.

Moreover, Petitioner fails to comprehend the essential distinction between *Gebser*, *Franklin* and this case: the harassers in *Gebser* and *Franklin* were employees of the school district. It can reasonably be argued that Title IX would reach the intentional sexually harassing actions of a teacher upon a student since such conduct arguably violates Title IX by conditioning benefits in the federally funded program on impermissible criteria. *Bougher v. University of Pittsburgh*, 713 F. Supp. 139, 145 (W.D.Pa. 1989). However, in this case neither the school district, nor any of its employees is alleged to have committed any act of harassment against LaShonda.

Petitioner seeks to hold the school district liable for its negligent failure to prevent another student, not its employee, from harassing LaShonda. *Davis*, 74 F.3d at 1196. Petitioner has not alleged any act of intentional discrimination or discriminatory purpose against LaShonda by Respondents. Respondents' alleged failure to take action to remedy alleged sexual harassment of LaShonda does not demonstrate intent by Respondent to discriminate against LaShonda in an educational program or activity on the basis of her sex. As the court held in *Bougher*, "to suggest, as plaintiff must, that unwelcome sexual advances, from whatever source, official or unofficial, constitute Title IX violations is a leap into the

unknown which, whatever its wisdom is the job of Congress," *Bougher*, 713 F. Supp. at 145. There is nothing in *Gebser* and *Franklin* to support Petitioner's contention that Title IX encompasses a claim for student-to-student sexual harassment. However, *Gebser* does reaffirm that Title IX recipients must have notice of the obligations imposed upon by accepting federal funds. The required notice is absent in this case. Therefore, this Court should affirm the Eleventh Circuit's ruling.

#### IV. Title VI Principles Should Be Applied In Determining Liability Under Title IX And Do Not Support A Claim For Student-To-Student Sexual Harassment

Title IX was patterned after Title VI, which prohibits intentional race-based discrimination. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). "Title VI on its own bottom reaches no further than the Constitution." *Guardians*, 463 U.S. at 603, citing, *University of California Regents v. Bakke*, 438 U.S. 265, 287 (1978); accord, *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993). Thus, this Court has held that Title VI does not of its own force proscribe unintentional racial discrimination. *Guardians*, 463 U.S. at 540.<sup>6</sup> Inasmuch as Title IX is patterned after

---

<sup>6</sup> Although Title VI has been extended beyond the constitution to reach impact discrimination, the extension was based upon Title VI implementing regulations which explicitly forbade impact discrimination. *Id.*, 463 U.S. at 591. However, OCR has not implemented any regulations under Title IX specifically governing sexual harassment which would expand

Title VI and it has been held that it should be interpreted in a similar manner, Title IX likewise reaches no further than the constitution, and does not proscribe unintentional sex discrimination.

It is unquestioned that the school district had no constitutional duty to protect LaShonda from the sexually harassing conduct of a private individual. *DeShaney*, 489 U.S. 189. Consequently, if the Constitution imposes no duty upon the school district to protect LaShonda, against acts of third parties neither does Title IX.

Further, Title IX like Title VI was adopted pursuant to Congress's spending power. *Guardians*, 463 U.S. at 603. Statutes adopted pursuant to Congress' spending power allow recovery of damages only where plaintiffs show intentional discrimination. *Id.* at 599-600.

In this case, Petitioner has alleged no act of intentional discrimination or discriminatory purpose on the part of the school district. What Petitioner has alleged is nothing more than negligence, i.e., that the school district negligently failed to prevent another student, not its employee, from harassing LaShonda or negligently failed to take sufficient action to end the harassment. However, a state actor's failure to remedy known private discrimination, such as harassment by students, does not make the state actor itself guilty of discrimination. Further, the

---

its scope to reach unintentional conduct and the complaint in this case does not set forth any claim based on impact or adverse effect. The Title IX regulations that do exist concern athletics, recruitment, admissions, financial aid and the like, 34 C.F.R. §§ 106.1-106.61, and are devoted to acts by recipients in administering those programs.



mere existence of sexual harassment does not necessarily constitute sexual discrimination. Discriminatory intent must be shown in every case. *Oncale v. Sundowner Offshore Services, Inc.*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 998, 140 L.Ed.2d 201 (1998). Thus, it follows that discrimination by the recipient must be alleged and shown.

Petitioner has not alleged that any employee of the school district participated in the alleged harassment of LaShonda. This fact distinguishes this case from *Gebser* wherein it was alleged that a teacher had harassed a student and requires a different result. In *Gebser*, the act of the teacher, an agent of the school district, in harassing the student was an intentional act. However, in this case there is no agent of the school district who is alleged to have harassed LaShonda or acted with a discriminatory purpose to intentionally cause her harm. Consequently, Petitioner's complaint fails to state a claim for relief under Title IX.

Petitioner's reliance upon the Ninth Circuit's holding in *Monteiro v. Tempe Union High Sch. Dist.*, No. 97-15511, 1998 WL 727338 (9th Cir. Oct. 19, 1998), to support the claim for student-to-student sexual harassment under Title IX is misplaced. The Ninth Circuit relied upon an incorrect legal standard as enunciated in OCR's Guidance addressing Title VI. In fact the Ninth Circuit conducted no analysis of Title VI and nowhere discussed this Court's rulings which require that a party seeking damages under Title VI show intentional discrimination. Consequently, *Monteiro* offers no support for Petitioner's position.

---

## CONCLUSION

For the foregoing reasons, the district court properly dismissed Petitioner's complaint for failure to state a claim for relief under Title IX.

Dated: December 7, 1998.

Respectfully Submitted,

W. WARREN FLOWDEN, JR.\*

WILLIAM T. PRESCOTT

\*Counsel of Record

JONES, CORK & MILLER

435 Second St., Fifth Floor

P.O. Box 6437

Macon, Georgia 31208-6437

(912) 745-2821

APPENDIX A

UNITED STATES DEPARTMENT OF EDUCATION  
Washington, D.C. 20202

Nov. 12, 1993

Mr. Craig M. Atlas  
Scolaro, Shulman, Cohen, Lawler,  
Burstein, & Ferrara, P.C.  
90 Presidential Plaza  
Corner of Townsend and Harrison Streets.  
Syracuse, New York 13202

Dear Mr. Atlas:

It is my pleasure to respond to your letter asking for information about sexual harassment in elementary and secondary education. In your letter, you specifically asked if the U.S. Department of Education Office for Civil Rights (OCR), has any information about suggested sexual harassment policies. You also asked whether there were any reported cases (or other information) on the following two issues: student-to-student sexual harassment at the primary education level, and what limits a school district should impose regarding hugging or other touching of students by staff members.

To date, we have found the following Title IX cases on sexual harassment in elementary and secondary education Gwinnett v. Franklin County Public Schools, 112 S.Ct. 1028 (1992); Patricia H. v. Berkeley Unified School District, \_\_\_ F.Supp. \_\_\_, 1993 WL 33510 (N.D. Cal.); and Doe v. Petaluma City School District, \_\_\_ F. Supp. \_\_\_, 1993 WL 359872 (N.D. Cal.).



I have enclosed the only existing OCR policy guidance on sexual harassment. Please note that this document was issued in 1981. While the procedural guidance is still good, the case law is outdated. This policy is currently under revision, and we are incorporating the issue of sexual harassment in elementary and secondary schools.

As for model sexual harassment policies for elementary and secondary schools, both the American Association of University Women (AAUW) and the National School Boards Association have sample policies. They may be contacted at the following addresses:

AAUW  
Program and Policy Department  
1111 16th Street, N.W.  
Washington, D.C. 20036  
(202) 785-7700

National Association of School Boards  
1680 Duke Street  
Alexandria, Virginia 22314  
(703) 838-6722

We have not reviewed these policies, and we can not endorse them. However, they may be useful to your client. In addition, if either you or your client are trying to develop such a policy, you should also feel free to

contact our regional technical assistance staff at the following address:

Ms. Paula D. Kuebler  
Regional Civil Rights Director  
Office for Civil Rights, Region II  
U.S. Department of Education  
26 Federal Plaza, 33rd Floor  
Room 33-130, 02-1010  
New York, New York 10278-0082

I hope this information is helpful to you.

Sincerely,

Stacey Roseberry  
Attorney Advisor  
Elementary and Secondary  
Education Policy Division  
Office For Civil Rights

Attachment  
As Stated

---

14

Supreme Court, U.S.  
**FILED**  
DEC 29 1998  
OFFICE OF THE CLERK

No. 97-843

**In The**  
**Supreme Court of the United States**  
**October Term, 1998**

---

Aurelia Davis, as next friend of LaShonda D.,

*Petitioner,*

v.

Monroe County Board of Education, *et al.*,

*Respondents.*

---

**On Writ of Certiorari**  
**to the United States Court of Appeals**  
**for the Eleventh Circuit**

---

**REPLY BRIEF FOR THE PETITIONER**

---

Deborah L. Brake  
Asst. Professor of Law  
University of Pittsburgh  
School of Law  
3900 Forbes Avenue  
Room 322  
Pittsburgh, PA 15260

Nancy Perkins  
Arnold & Porter  
555 12th Street, N.W.  
Washington, D.C. 20004

*Of Counsel*  
December 29, 1998

Marcia D. Greenberger  
Verna L. Williams\*  
Leslie T. Annexstein  
Neena K. Chaudhry  
National Women's Law Center  
11 Dupont Circle, N.W., Suite 800  
Washington, D.C. 20036  
(202) 588-5180

*Attorneys for Petitioner*

\*Counsel of Record

1998



## TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
ARGUMENT .....	3
I. TITLE IX REQUIRES SCHOOLS TO ADDRESS AND REMEDY STUDENT-TO-STUDENT SEXUAL HARASSMENT. ....	3
A. The Spending Clause Does Not Bar Coverage of Student-to-Student Sexual Harassment under Title IX. ....	3
B. Under <i>Gebser</i> , Schools Are Directly Liable for Their Own Failure to Respond to Sexual Harassment -- Regardless of the Harasser's Status as an Agent of the Recipient. ....	7
II. REQUIRING SCHOOLS TO REMEDY AND ADDRESS STUDENT-TO-STUDENT HARASSMENT IS CONSISTENT WITH AND ADVANCES TITLE IX'S GOAL OF ELIMINATING SEX DISCRIMINATION IN EDUCATION PROGRAMS AND ACTIVITIES. ....	10
CONCLUSION .....	15

## TABLE OF AUTHORITIES

	<i>Page(s)</i>
<b>FEDERAL CASES</b>	
<i>Bennett v. Kentucky Dep't of Educ.</i> , 470 U.S. 656 (1985) . . . .	5
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979) . . . .	4-6, 9
<i>Crawford v. Davis</i> , 109 F.3d 1281 (8th Cir. 1997) . . . . .	6
<i>Doe v. University of Illinois</i> , 138 F.3d 653 (7th Cir. 1998) . . . . .	6, 13
<i>Felder v. Casey</i> , 487 U.S. 131 (1988) . . . . .	7
<i>Franks v. Kentucky School for the Deaf</i> , 142 F.3d 360 (6th Cir. 1998) . . . . .	6
<i>Franklin v. Gwinnett County Pub. Sch.</i> , 503 U.S. 60 (1992) . . . . .	3-6, 10
<i>Gebser v. Lago Vista Ind. Sch. Dist.</i> , 118 S. Ct. 1989 (1998) . . . . .	2, 4-8, 10, 11
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) . . . . .	7
<i>Morse v. Regents of Univ. of Colo.</i> , 154 F.3d 1124 (10th Cir. 1998) . . . . .	10
<i>Oncala v. Sundowner Offshore Serv.</i> , 118 S. Ct. 998 (1998) . . . . .	8, 12
<i>Owen v. City of Independence</i> , 445 U.S. 622 (1980) . . . . .	7

## Table of Authorities (continued)

	<i>Page(s)</i>
<i>Pennhurst State Sch. &amp; Hosp. v. Halderman</i> , 451 U.S. 1 (1981) . . . . .	5, 6
<i>Salinas v. United States</i> , 118 S. Ct. 469 (1997) . . . . .	6
<i>School Board of Nassau County v. Arline</i> , 480 U.S. 273 (1987) . . . . .	6
<b>FEDERAL STATUTES</b>	
20 U.S.C. § 1681 . . . . .	2
42 U.S.C. § 2000e(b) . . . . .	8
Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701 . . . . .	5
Rehabilitation Act of 1973, 29 U.S.C. § 794 . . . . .	6
<b>LEGISLATIVE HISTORY</b>	
118 Cong. Rec. 5804 (1972) . . . . .	9
<b>MISCELLANEOUS</b>	
<i>EEOC Policy Guidance on Sexual Harassment</i> , 8 FEP Manual 405:6699 (Mar. 19, 1990) . . . . .	14
<i>Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties: Final Policy Guidance</i> , 62 Fed. Reg. 12,034 (1997) . . . . .	11, 12, 13



**Table of Authorities (continued)**

	<i>Page(s)</i>
<i>Sexual Harassment in School: The Public Performance of Gendered Violence</i> , 65 Harvard Educ. Rev. 145, 156 -57 (1995) .....	13

No. 97-843

---

**In The  
Supreme Court of the United States  
October Term, 1998**

---

Aurelia Davis, as next friend of LaShonda D.,  
*Petitioner,*

v.

Monroe County Board of Education, *et al.*,  
*Respondents.*

---

**On Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit**

---

**REPLY BRIEF FOR THE PETITIONER**

---

**INTRODUCTION**

Respondents misread the plain language of Title IX and this Court's precedents interpreting it to claim that educational institutions are never required to address or remedy student-to-student harassment under Title IX.

Respondents maintain that because Title IX and its legislative history do not specifically mention student-to-student sexual harassment, the Spending Clause's requirement of notice has not been satisfied. Additionally, Respondents insist that Title IX's coverage of sexual harassment depends on whether the person committing the harassment has an agency relationship with the institution. Under their reading of the statute, no matter how severe or pervasive the harassment, how much school officials knew about it, or how capable they were of remedying the misconduct, Title IX provides no authority to the government or the courts to hold schools accountable for refusing to address this form of discrimination. They are wrong on all counts.

Regarding the absence of specific statutory language on student-to-student harassment, as Petitioner demonstrated in her opening brief, the plain language of Title IX supports its coverage. Title IX requires institutions to ensure that students are not "excluded from participation in, . . . denied the benefits of, or . . . subjected to discrimination under" their education programs or activities. *See* 20 U.S.C. § 1681. Accordingly, when a school refuses to remedy a sexually hostile environment targeting a student, that institution violates the explicit terms of the statute. *See* Brief for Petitioner ("Pet. Br.") at 11-16. Petitioner further demonstrated that Title IX's legislative history and interpretations of the statute by this Court and the expert agency charged with its enforcement support this reading of the statute. Pet. Br. at 11-37. Respondents fail to advance an argument as to why the statutory language does not mean what it says.

Moreover, as discussed in more detail below, Respondents' case is utterly at odds with this Court's precedents, most recently *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998), which would not

survive under Respondents' Spending Clause analysis. *Gebser and Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), establish that Title IX's broad prohibition against sex discrimination more than amply notified recipients, including Respondents, of their obligations not to "subject" students to sexual harassment, satisfying the Spending Clause notice requirement. Additionally, under *Gebser*, it is abundantly clear that pursuant to Title IX's directive, recipients' failure to address peer sexual harassment subjects them to damages liability under Title IX for their own actions and not those of the initial source of the harassment. Finally, covering student-to-student harassment under Title IX is consistent with the letter and spirit of the statute and its goal of eradicating sex discrimination in federally funded education.

## ARGUMENT

### I. TITLE IX REQUIRES SCHOOLS TO ADDRESS AND REMEDY STUDENT-TO-STUDENT SEXUAL HARASSMENT.

#### A. The Spending Clause Does Not Bar Coverage of Student-to-Student Sexual Harassment under Title IX.

Respondents make much of the lack of explicit language in Title IX addressing peer sexual harassment. They note that the statute does not "expressly create a cause of action" for student-to-student harassment; that neither the legislative history nor the regulations mention such discrimination; and that the policy guidance by the Office for Civil Rights is of such recent vintage as to be "irrelevant" for notice purposes. Brief for Respondents ("Resp. Br.") at 9,



14, 18.<sup>1</sup> These arguments misconstrue the requirements of the Spending Clause and directly contradict this Court's decisions in *Gebser* and *Franklin*.<sup>2</sup>

This Court's precedents, most recently *Gebser*, undermine the heart of Respondents' case. An essential predicate to *Gebser* is that Title IX covers teacher-to-student sexual harassment, consistent with *Franklin*'s holding. Respondents seem to suggest that these cases did not actually determine that Title IX covered such harassment, but only made damages available. Resp. Br. at 25. However, as an analytical matter, the Court could not have reached the damages issue without recognizing that a cause of action exists for an institution's failure to address and remedy teacher-to-student harassment. See, e.g., *Franklin*, 503 U.S. at 74 ("Federal courts cannot reach out to award remedies when the Constitution or laws of the United States do not support a cause of action."). In these cases, the Court interpreted Title IX to encompass teacher-to-student sexual harassment despite the absence of language to that effect in the statute, in its legislative history, and in the implementing regulations promulgated by the expert enforcement agency. Moreover, at the time *Franklin* was decided, there was no formal policy guidance at all regarding sexual harassment.

---

<sup>1</sup>Respondents further attempt to buttress their argument that schools lacked notice that condoning sexually hostile environments could violate Title IX by asserting erroneously that this Court "did not address the concept of sexual harassment under Title IX until this year." Resp. Br. at 14. However, the Court had decided *Franklin* eight months before LaShonda first reported the sexual harassment she experienced in her school.

<sup>2</sup>Indeed, Respondents' theory would overrule *Cannon v. University of Chicago*, 441 U.S. 677 (1979), which first recognized a private right of action under Title IX -- despite the lack of any express statutory language whatsoever regarding such a cause of action.

Respondents' theory thus would have compelled the Court to deny a cause of action and the availability of damages for teacher-to-student harassment. Respondents fail to acknowledge or address this key element of *Gebser* and *Franklin*, and in so doing, fail to overcome a major weakness in their analysis.

Just as in *Gebser*, the Spending Clause is not a barrier to recognizing that a Title IX recipient may be liable for its failure to remedy the sexual harassment of a student in cases such as this one. Title IX's broad prohibition against sex discrimination, unlike the statute at issue in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), upon which Respondents rely heavily, is neither precatory nor ambiguous. While the "bill of rights" the Court considered in *Pennhurst* merely articulated findings and expressed Congress' goals, Title IX mandates that federal education recipients not "exclude" persons, "deny" them the benefits of, or "subject" them to discrimination "under" their programs or activities. Compare *Pennhurst*, 451 U.S. at 19 (holding that the provision at issue simply was "too thin a reed to support the rights and obligations read into it by the court below"), with *Cannon*, 441 U.S. at 694 (noting that "Title IX explicitly confers a benefit on persons discriminated against on the basis of sex" and recognizing a private right of action);<sup>3</sup> see

---

<sup>3</sup>The Court has held that the Spending Clause does not require statutes to enumerate every possible cause of action that may arise. See, e.g., *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985) ("[T]he Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of Title I [of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701.]"). Additionally, the Court has distinguished the strong federal mandate of statutes like Title IX, noting that the "bill of rights" at issue in *Pennhurst* was "at most a nudge in the preferred direction. . . . The contrast between the congressional preference at issue [in that case] and the antidiscrimination mandate of § 504 [of the Rehabilitation Act of

also Pet. Br. at 28 n.14.

Given Title IX's mandate, it is hardly surprising that the Court reaffirmed in *Gebser*, building upon *Franklin*, that teacher-to-student sexual harassment violates the statute. When an institution refuses to remedy sexual harassment of a student it, at the very least, "subjects" that student to discrimination under the education program or activity. The same holds true in the context of unremedied peer sexual harassment. The statute's proscription against sex discrimination -- irrespective of the form it takes -- has provided recipients with sufficient notice for Spending Clause purposes that they had a duty under Title IX to address the sexual harassment of students.<sup>4</sup> Cf. *Salinas v.*

---

1973, 29 U.S.C. § 794,] could not be more stark." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 286 n.15 (1987) (internal quotation marks and citations omitted). Similarly, Title IX represents a strong federal mandate against sex discrimination that bears no resemblance to the legislative findings considered in *Pennhurst*.

<sup>4</sup>As a measure designed to remedy and prevent sex discrimination, Title IX also is a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment. See, e.g., *Cannon*, 441 U.S. at 704 (noting that Title IX was enacted to avoid the use of federal resources to support discriminatory practices and provide individuals with effective protection against such practices); *id.* at 688 n.7 (observing that Title IX is part of the nation's "civil rights enforcement scheme . . . to enforce the 14th amendment by eliminating entirely such forms of discrimination"); *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998) (holding that Title IX was enacted pursuant to Section 5); *Doe v. University of Illinois*, 138 F.3d 653 (7th Cir.), petition for cert. filed, 67 U.S.L.W. 3083 (July 13, 1998) (same); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997) ("[W]e are unable to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by § 5."); see also Brief of *amicus curiae* American Civil Liberties Union at 5-13. However, as in *Franklin*, the Court need not resolve the sources of authority for Title IX to decide this case. See *Franklin*, 503 U.S. at 75 n.8.

*United States*, 118 S. Ct. 469, 475 (1997) (refusing to limit the scope of law prohibiting bribery in programs accepting federal funds, noting that "[a] statute can be unambiguous without addressing every interpretive theory by a party").<sup>5</sup>

**B. Under *Gebser*, Schools Are Directly Liable for Their Own Failure to Respond to Sexual Harassment -- Regardless of the Harasser's Status as an Agent of the Recipient.**

Respondents mistakenly link this Court's determination regarding liability in *Gebser* to the fact that the harasser was an agent of the school board.

In *Gebser*, this Court specifically considered and rejected the use of agency principles to hold a recipient liable in damages for the conduct of the harasser. 118 S. Ct. at 1996. As *Gebser* made clear, the basis for damages liability under Title IX is the recipient's own failure to address the sexual harassment. *Id.* at 1999. The recipient's failure to respond to such misconduct directly subjects students to

---

<sup>5</sup>Respondents further suggest that their purported lack of notice regarding their obligation to remedy peer harassment should entitle them to some form of qualified immunity. Resp. Br. at 12-13. Since the claim at issue is against the school board as a recipient of federal funds, and not against one of the individuals who refused to respond to Petitioner's pleas for help in ending the harassment against her daughter, there would be no qualified immunity even if this were a § 1983 action, and hence there is no basis for creating such immunity here. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982) (establishing that public officials acting in their individual capacities are entitled to qualified immunity under § 1983); *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (holding that qualified immunity is not available to local government entities). Moreover, even this action were against individuals under § 1983, injunctive relief would be available. See, e.g., *Felder v. Casey*, 487 U.S. 131, 137 (1988).



discrimination and denies them the benefits and opportunities of the education program, in blatant violation of Title IX. In this regard, *Gebser* clarifies that the appropriate focus is on the relationship between the student and the educational program operated by the recipient, not on the identity of the harasser. *Id.* at 1999-2000. Thus, under *Gebser*, it is clear that the agency relationship between the recipient and the harasser is not necessarily the foundation for a violation of Title IX.

Even under Title VII,<sup>6</sup> where the term “agents” appears in the statute itself, 42 U.S.C. § 2000e(b), employers can be held directly liable for actions of non-agents, as well as those of agents. As this Court has made clear, under Title VII, the crucial issue to be examined is the nature of the conduct and the response of the employer, regardless of whether the harasser is a peer, supervisor, or a non-agent. *See, e.g., Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998, 1001 (1998). Thus, under Title VII, employer liability can turn on the employer’s own conduct and not whether the harassment is perpetrated by a supervisor, co-worker, or others. Any agency relationship with the harasser simply is not a necessary predicate for a violation. Similarly, under Title IX, where a school condones sexual harassment among students and perpetuates a hostile and abusive educational environment, the school must be held accountable, whether or not the harasser has an agency relationship with the school.

Respondents’ efforts to analogize to tort law concepts or § 1983 to preclude coverage of peer harassment under Title IX also are unavailing. Title IX is not coterminous with tort law or constitutional due process protections. Congress

---

<sup>6</sup>The principles of Title VII can inform the analysis of Title IX claims. *Gebser*, 118 S. Ct. at 1995.

enacted Title IX to provide new safeguards against discrimination, which by definition were not necessarily available under other laws.<sup>7</sup> *See, e.g.*, 118 Cong. Rec. 5804 (1972) (noting that Title IX was to provide “women with solid legal protection from . . . persistent, pernicious discrimination”). Even assuming *arguendo* that neither the common law nor the Due Process Clause of the Constitution ever requires an entity to protect citizens from the actions of third persons, as Respondents contend, this fact has no bearing on Title IX and the obligation it imposes on educational institutions. Title IX’s broad proscription against sex discrimination in federally funded education programs, which does not delineate the perpetrator of the discrimination, places an affirmative duty upon the recipient of federal funds to ensure that students are not “subjected to” sex discrimination.

Finally, Respondents’ assertion that the allegations at issue amount to no more than “negligent[] fail[ure] to prevent a student, not an employee from harassing LaShonda” and

---

<sup>7</sup>While tort and other state law remedies can reach some of the discrimination prohibited by Title IX, that fact should not foreclose recognizing peer harassment under Title IX. Similar remedies are available in the context of employment; however, they do not preclude the ability of victims to seek relief under Title VII. This is so because Title VII and Title IX are appropriate manifestations of the federal government’s power to enact measures to “protect citizens against . . . discrimination.” *Cannon*, 441 U.S. at 709. Nor do they address an important purpose of Title IX -- to preclude federal funding of discrimination. *Id.*

Moreover, state remedies do not provide adequate protection for students against sexual harassment, although if Respondents’ arguments were to be adopted, any state protection would be greater than that provided by Title IX. For example, Georgia law requires only that school boards adopt and mail a student code of conduct to the State Board of Education. Ga. Code Ann. § 20-2-751.3(a) & (c).

therefore do not merit damages relief, completely misses the mark. Resp. Br. at 27. Petitioner's claims fit squarely within the framework *Gebser* and *Franklin* have constructed. Specifically, the gravamen of Petitioner's complaint is that, despite repeated complaints of harmful sexual harassment, Respondents were "willfully and deliberately indifferent" to the discrimination targeting LaShonda. Pet. App. at 98a. Petitioner's complaint -- that Respondents "subjected" LaShonda to discrimination -- thus satisfies the *Gebser* standard for damages. See, e.g., *Morse v. Regents of Univ. of Colo.*, 154 F.3d 1124, 1128 (10th Cir. 1998) (concluding that plaintiff had stated a claim for damages under Title IX where complaint alleged school officials' actual knowledge and failure to take any remedial action regarding peer harassment).

## II. REQUIRING SCHOOLS TO REMEDY AND ADDRESS STUDENT-TO-STUDENT HARASSMENT IS CONSISTENT WITH AND ADVANCES TITLE IX'S GOAL OF ELIMINATING SEX DISCRIMINATION IN EDUCATION PROGRAMS AND ACTIVITIES.

Respondents suggest that requiring schools to address sexual harassment by students would make "childish conduct" actionable, result in children carrying the "stigma" of being labeled sexual harassers, and require the courts to second-guess school administrators. Resp. Br. at 13. Respondents ignore the fact that actual discrimination that interferes with an individual's ability to gain an education violates Title IX, not childish behavior. Moreover, Title IX does not require labeling students as harassers. Rather, under Title IX schools are held accountable for whether their conduct meets the statute's principles. Thus, Title IX does not give schools total carte blanche, as Respondents would prefer, to ignore all student-to-student harassment and not be

held accountable. Respondents seek to deny students all protection from discriminatory sexual harassment regardless of its severity and the harm it exacts, regardless of how apparent or remediable by the school it may be. Such a result cannot be squared with Title IX's letter or spirit.

Indeed, requiring educational institutions to address and remedy peer harassment provides students with exactly the kind of protection Congress envisioned when it enacted Title IX. See Pet. Br. at 16-25. As this Court has recognized: "No one questions that a student suffers extraordinary harm when subjected to sexual harassment . . . and that the . . . conduct is reprehensible and undermines the basic purposes of the educational system." *Gebser*, 118 S. Ct. at 2000. When students are subjected to misconduct that properly can be termed discriminatory sexual harassment, it necessarily impedes a student's ability to gain an education:

[S]exual harassment can interfere with a student's academic performance and emotional and physical well-being . . . [P]reventing and remedying sexual harassment in schools is essential to ensure non-discriminatory environments in which students can learn.

See Br. of amici curiae NOW Legal Defense and Education Fund *et al.*, at 8 (citing *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties: Final Policy Guidance*, 62 Fed. Reg. 12,034 (1997) [hereinafter *OCR Policy Guidance*]). Because Title IX mandates that institutions not subject students to sex discrimination in their programs and activities, requiring institutions to remedy and address peer sexual harassment is consistent with the statute and advances the federal government's commitment to eradicating sex discrimination in education.



It is important to note that Title IX, like Title VII, "does not prohibit all verbal or physical harassment . . . it is directed only at discrimination because of sex." *Oncale*, 118 S. Ct. at 1002. In this regard, Title IX proscribes

only behavior so objectively offensive as to alter the conditions of the victim's [education]. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive . . . environment . . . is beyond [Title IX's] purview. . . [T]he objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.

*Id.* at 1003 (internal quotation marks and citations omitted); see also *OCR Policy Guidance*, 62 Fed. Reg. at 12,041 n.44 (adapting Title VII standards to the education context, noting, for example, that the "reasonableness" standard should take into account the victim's age, *inter alia*). Accordingly, the legal principles that have developed under Title IX, informed by Title VII, ensure that child's play is not actionable under Title IX.

In this connection, covering school-sanctioned peer sexual harassment under Title IX will not lead to automatic liability of schools or a flood of litigation. Title IX requires schools to respond appropriately to sexual harassment -- not perfectly. As the Seventh Circuit has recognized:

In holding that schools have a duty to take prompt and appropriate action to remedy student-on-student sexual harassment, this Court does not imply that schools must be successful in completely eradicating sexual

harassment from their campuses and programs.

See *Doe*, 138 F.3d at 667. The court also observed that Title IX liability for peer sexual harassment does not "threaten to produce . . . a flood [of suits]" and that "[c]ourts are free . . . to dispose of suits that lack merit." *Id.* at 666; see also Brief of *amici curiae* National Education Association ("NEA Br.") *et al.*, at 20 n.17 ("Lawsuits can be preempted through preventive and sensible measures employed in schools.") (quoting Nan Stein, *Sexual Harassment in School: The Public Performance of Gendered Violence*, 65 Harv. Educ. Rev. 145, 156-57 (1995)). In addition, the *Doe* court addressed the concern that federal courts would be obliged or required to substitute their own judgment for that of school officials, noting that:

School officials . . . must decide how to respond . . . [and] must choose from a range of responses. As long as the responsive strategy chosen is one plausibly directed toward putting an end to the . . . harassment, courts should not second-guess the professional judgments of school officials.

*Doe*, 138 F.3d at 667; see also *OCR Policy Guidance*, 62 Fed. Reg. at 12,042 ("What constitutes a reasonable response [to sexual harassment] will differ depending on the circumstances."); NEA Br. at 11-13 (citing the range of responses available to schools to address peer harassment).

In fact, requiring schools to address and remedy peer sexual harassment under Title IX will provide schools with the appropriate incentives to prevent this behavior. Cf. *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292 (1998) ("It would therefore implement clear statutory policy

and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty."); *EEOC Policy Guidance on Sexual Harassment*, 8 FEP Manual 405:6699 (Mar. 19, 1990). Indeed, according to the Brief of *amici curiae* National Association of School Boards *et al.* at 27-30, many school districts already are implementing policies, training, and other measures designed to prevent peer sexual harassment and hence are limiting their exposure to liability under Title IX. *See also* NEA Br. at 13-16. Thus, covering peer harassment under Title IX will encourage schools to protect themselves from liability by implementing preventive measures and by taking appropriate steps to remedy harassment when it occurs. In contrast, the Eleventh Circuit's holding and the arguments Respondents advance provide no such incentives for schools and no protection from discrimination for students.

In sum, Respondents' insistence that Title IX imposes no requirements on schools to remedy and address student-to-student sexually harassment is untenable. Title IX's clear mandate against sex discrimination is sufficiently broad to encompass the claim alleged here. For the reasons discussed above and in Petitioner's opening brief, Respondents' arguments to the contrary cannot be squared with this Court's precedents or the language of the statute itself.

## CONCLUSION

Petitioner urges this Court to reverse the judgment of the Eleventh Circuit and remand the case.

Respectfully submitted,

Deborah L. Brake  
Asst. Professor of Law  
University of Pittsburgh  
School of Law  
3900 Forbes Avenue  
Room 322  
Pittsburgh, PA 15260

Nancy Perkins  
Arnold & Porter  
555 12th Street, N.W.  
Washington, D.C. 20004

*Of Counsel*  
December 29, 1998

Marcia D. Greenberger  
Verna L. Williams\*  
Leslie T. Annexstein  
Neena K. Chaudhry  
National Women's Law Center  
11 Dupont Circle, N.W., Suite 800  
Washington, D.C. 20036  
(202) 588-5180

*Attorneys for Petitioner*

\*Counsel of Record



10

**FILED**

**NOV 10 1998**

**No. 97-843**

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

**In the Supreme Court of the United States**

**OCTOBER TERM, 1998**

**AURELIA DAVIS, AS NEXT FRIEND OF LASHONDA D.,  
PETITIONER**

*v.*

**MONROE COUNTY BOARD OF EDUCATION, ET AL.**

**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER**

**SETH P. WAXMAN**  
*Solicitor General  
Counsel of Record*

**BILL LANN LEE**  
*Acting Assistant Attorney  
General*

**BARBARA D. UNDERWOOD**  
*Deputy Solicitor General*

**BETH S. BRINKMANN**  
*Assistant to the Solicitor  
General*

**DENNIS J. DIMSEY  
LINDA F. THOME**  
*Attorneys  
Department of Justice  
Washington, D.C. 20530-0001  
(202) 514-2217*

2908

### QUESTION PRESENTED

Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

The question presented is:

Whether a school board can be liable under Title IX for responding with deliberate indifference to a student's repeated complaints about severe and pervasive sexual harassment by another student in the course of the school's education programs and activities.



## TABLE OF CONTENTS

	Page
Interest of the United States .....	1
Statement .....	2
Summary of argument .....	9
Argument .....	11
Petitioner has stated a claim under Title IX for both damages and equitable relief .....	11
A. Title IX, as construed by this Court in <i>Gebser</i> , provides an implied private right of action for damages based on a fund recipient's deliberate indifference to repeated complaints about severe and pervasive sexual harassment of a student by another student in the recipient's education programs and activities .....	11
B. Petitioner's allegations need not meet the <i>Gebser</i> standard to support a claim for equitable relief .....	19
Conclusion .....	25

## TABLE OF AUTHORITIES

### Cases:

<i>Atascadero State Hosp. v. Scanlon</i> , 473 U.S. 234 (1985) .....	20
<i>Bennett v. Kentucky Dep't of Educ.</i> , 470 U.S. 656 (1985) .....	18
<i>Cannon v. Univ. of Chicago</i> , 441 U.S. 677 (1979) .....	20, 24, 25
<i>Doe v. Univ. of Illinois</i> , 138 F.3d 653 (7th Cir. 1998), petition for cert. pending, No. 98-126 .....	14-15, 16, 18
<i>Franklin v. Gwinnett County Pub. Schs.</i> , 503 U.S. 60 (1992) .....	5, 6, 8, 11, 14, 21, 23
<i>Gebser v. Lago Vista Indep. Sch. Dist.</i> , 118 S. Ct. 1989 (1998) .....	<i>passim</i>
<i>Grove City College v. Bell</i> , 465 U.S. 555 (1984) .....	22

## IV

Cases—Continued:	Page
<i>Guardians Ass'n v. Civil Serv. Comm'n</i> , 463 U.S. 582 (1983) .....	21
<i>Harris v. Forklift Sys., Inc.</i> , 510 U.S. 17 (1993) .....	11, 16
<i>Meritor Savings Bank, FSB v. Vinson</i> , 477 U.S. 57 (1986) .....	14, 16
<i>Mississippi Univ. for Women v. Hogan</i> , 458 U.S. 718 (1982) .....	20
<i>North Haven Bd. of Educ. v. Bell</i> , 456 U.S. 512 (1982) .....	11, 22
<i>Oncala v. Sundowner Offshore Servs., Inc.</i> , 118 S. Ct. 998 (1998) .....	11, 16
<i>Pennhurst State School &amp; Hospital v. Halderman</i> , 451 U.S. 1 (1981) .....	17, 21
<i>Rogers v. EEOC</i> , 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) .....	14
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974) .....	8
<i>School Bd. of Nassau County v. Arline</i> , 480 U.S. 273 (1987) .....	17
<i>United States v. Fordice</i> , 505 U.S. 717 (1992) .....	20
<i>United Steelworkers v. Weber</i> , 443 U.S. 198 (1979) .....	20
<i>Welch v. Texas Dep't of Highways &amp; Pub. Transp.</i> , 483 U.S. 468 (1987) .....	20
Constitution, statutes, regulations and rule:	
U.S. Const.:	
Amend. XIV, § 5 .....	20
Art. I, § 8, Cl. 1 (Spending Clause) .....	8, 20
Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. 1988 .....	20
Civil Rights Act of 1964, 42 U.S.C. 2000a et seq.:	
Tit. VI, 42 U.S.C. 2000d et seq. ....	20
Tit. VII, 42 U.S.C. 2000e et seq. ....	20

## V

Statutes, regulations and rule—Continued:	Page
Education Amendments of 1972, Tit. IX, 20 U.S.C. 1681 et seq. ....	<i>passim</i>
20 U.S.C. 1681 .....	11, 16
20 U.S.C. 1682 .....	1, 11, 21, 22, 24
Education Amendments of 1974, Pub. L. No. 93-380, § 509(a)(2), 88 Stat. 567, 20 U.S.C. 1232(d)(1), (1970 & Supp. IV 1974) .....	22
Rehabilitation Act of 1973, § 504, 29 U.S.C. 794 .....	17, 20
42 U.S.C. 1981 .....	2
42 U.S.C. 1983 .....	2
28 C.F.R. 0.51 (1998) .....	1
34 C.F.R.:	
Pt. 106 .....	1
Section 106.3 .....	22
Section 106.3(a) .....	22
Section 106.4(a) .....	23
Section 106.8(a) .....	23
Section 106.8(b) .....	23
Section 106.9(a) .....	23
45 C.F.R. Pt. 86 (1975) .....	22
Fed. R. Civ. P. 12(b)(6) .....	5
Miscellaneous:	
Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980) .....	1
40 Fed. Reg. 24,128 (1975) .....	22
59 Fed. Reg. (1994):	
pp. 11,448-11,454 .....	22
p. 11,449 .....	22
62 Fed. Reg. (1997):	
p. 12,034 .....	1, 8, 10
p. 12,037 .....	21
p. 12,038 .....	24
p. 12,039 .....	10, 21
p. 12,040 .....	15
pp. 12,039-12,040 .....	8
p. 12,042 .....	16
pp. 12,044-12,045 .....	23



**In the Supreme Court of the United States**

OCTOBER TERM, 1998

---

No. 97-843

AURELIA DAVIS, AS NEXT FRIEND OF LASHONDA D.,  
PETITIONER

*v.*

MONROE COUNTY BOARD OF EDUCATION, ET AL.

---

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER**

---

**INTEREST OF THE UNITED STATES**

The United States Department of Education administers federal financial assistance to education programs and activities and is authorized by Congress to effectuate Title IX in those programs and activities. 20 U.S.C. 1682. Pursuant to that authority, the Department, through its Office for Civil Rights (OCR), has promulgated regulations effectuating Title IX, 34 C.F.R. Pt. 106, and policy guidance on the prohibition of sexual harassment under Title IX, 62 Fed. Reg. 12,034 (1997). The Department of Justice, through its Civil Rights Division, coordinates the implementation and enforcement of Title IX by the Department of Education and other executive agencies. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980); 28 C.F.R. 0.51 (1998).

The Department of Justice also may enforce Title IX in federal court in cases referred to it by the Department of Education. At the Court's invitation, the United States filed a brief at the petition stage of this case. The United States also participated as amicus curiae in the court of appeals before the panel and the en banc court.

#### STATEMENT

1. a. Petitioner filed this action alleging, *inter alia*, a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and seeking damages and injunctive relief on behalf of her daughter, LaShonda D., against respondent Monroe County Board of Education.<sup>1</sup> Petitioner alleges that the Board of Education, a recipient of federal financial assistance, responded with deliberate indifference to repeated complaints made by her and her daughter (then a fifth-grade student in a school administered by respondent) about severe sexual harassment of her daughter over a period of more than five months by a male classmate, G.F. Petitioner alleges that respondent's deliberate indifference to the complaints of sexual harassment perpetuated an intimidating, hostile, offensive, and abusive school environment that limited her daughter's ability to participate in and to benefit from the education program, in violation of respondent's obligations under Title IX. Pet. App. 93a-101a.

Petitioner alleges that G.F. harassed her daughter on at least eight separate occasions at school and during school hours, between December 17, 1992, and May 19,

<sup>1</sup> Petitioner's Title IX claims against two individual school officials, her race discrimination claim under 42 U.S.C. 1981, and her various claims under 42 U.S.C. 1983 were rejected below and are not before this Court. See Pet. App. 2a-3a & n.3.

1993.<sup>2</sup> School officials were informed about each of those incidents by petitioner, her daughter, or both. Pet. App. 95a-97a. G.F. repeatedly attempted to touch LaShonda's breasts and vaginal area. On one occasion, G.F. rubbed his body against LaShonda in a sexually suggestive manner. *Id.* at 96a. On another occasion, G.F. put a door stop in his pants and behaved in a sexually suggestive manner toward LaShonda. *Ibid.* G.F. also directed vulgar comments to LaShonda, indicating a desire to have sexual contact with her. *Id.* at 95a-96a. After an incident on May 19, LaShonda told petitioner that she "didn't know how much longer she could keep him off her." *Id.* at 97a. As a result of that incident, G.F. was charged with and pled guilty to sexual battery. *Ibid.*

After each incident, LaShonda reported G.F.'s behavior to one or more of her teachers; she complained to at least three different teachers at the school that G.F. was sexually harassing her in classes or activities under their supervision. Pet. App. 96a-97a. Petitioner also complained to at least two of her daughter's teachers, and was assured that the school principal had been notified about the sexual harassment. *Ibid.* At one point, LaShonda and other girls who had been sexually harassed by G.F. wanted to go as a group to speak to the principal about the harassment, but their teacher told them, "If he wants you, he'll call you." *Id.* at 96a. On or about May 19, petitioner and her daughter spoke directly to the principal to see what action would be taken about the sexual harassment, but the principal merely stated: "I guess I'll have to threaten him (G.F.)

<sup>2</sup> Because petitioner's complaint was dismissed for failure to state a claim, the allegations of the complaint must be taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).



a little bit harder." *Id.* at 97a. During that conversation, the principal asked LaShonda "why she was the only one complaining." *Ibid.*

Petitioner alleges that school officials did not discipline G.F. at any time during the period in which he was harassing LaShonda, despite LaShonda's and petitioner's repeated complaints. Pet. App. 97a. G.F. was not suspended for this conduct, kept away from LaShonda, or reprimanded in any other way. *Ibid.* Moreover, school officials refused even to take minimal measures to keep G.F. away from LaShonda during a substantial part of that time. For example, LaShonda's assigned classroom seat was next to G.F. and, although LaShonda asked several times to be moved to a different seat so that she could prevent contact with G.F., she was not permitted to do so for over three months. *Ibid.*

During this entire period, the Board of Education had no policy regarding sexual harassment and had not given its employees any training or other guidance on how to respond to complaints from students about sexual harassment. Pet. App. 98a.

As a result of respondent's inaction in response to the complaints about the continuing sexual harassment, a hostile educational environment persisted at the school, and LaShonda's ability to attend school and to perform her studies and activities was impeded. Pet. App. 97a. Her ability to concentrate on her school work was affected by her constant efforts to fend off G.F.'s sexual harassment, and her grades dropped. *Ibid.* In April 1993, LaShonda's father discovered a suicide note she had written. *Ibid.*

Petitioner alleges that respondent engaged in deliberate indifference and intentional discrimination against LaShonda that warrants money damages and

equitable relief. Petitioner specifically alleges that respondent, in its "failure to have a policy concerning sexual harassment of students and in [its] failure to respond to the complaints of this student, was willfully and deliberately indifferent." Pet. App. 98a. She alleges that "[t]he deliberate indifference [of respondent] to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abus[ive] school environment in violation of Title IX." *Id.* at 100a. Respondent's "failure to take action resulted in extreme emotional damage to LaShonda." *Id.* at 100a-101a. Petitioner asserts that, "[h]ad [the school principal] intervened as was necessary, the injury to LaShonda would have been mitigated and the situation would have been ended." *Id.* at 100a. In addition to damages, petitioner sought an injunction requiring respondent "to institute a policy providing guidance for employees in the event of sexual harassment of students by fellow students," and enjoining respondent "from discriminating against female students by failing to respond to complaints of sexual harassment." *Id.* at 102a.

b. The district court dismissed petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. Pet. App. 82a-90a. The court recognized that Title IX is enforceable through an implied cause of action, *id.* at 88a (citing *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992)), but ruled that "sexually harassing behavior of a fellow fifth grader is not part of a school program or activity." Pet. App. 88a. In the court's view, petitioner had not alleged "that the Board or an employee of the Board had any role in the harassment," and therefore "any harm to LaShonda

was not proximately caused by a federally-funded educational provider." *Id.* at 88a-89a.

2. a. A divided panel of the Eleventh Circuit reversed the district court's dismissal of the Title IX claim and remanded for further proceedings. Pet. App. 62a-81a. The panel noted that, fairly construed, petitioner's complaint alleged that harm to LaShonda was proximately caused by the school officials' "failure to take action to stop the offensive acts of those over whom the officials exercised control," *id.* at 75a, thereby discriminating against LaShonda and denying her the benefits of the education program on the basis of her sex, *id.* at 66a. The panel concluded that "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment." *Id.* at 73a-74a (citing *Franklin*, 503 U.S. at 74-75). In such circumstances, "the harassed student has 'be[en] denied the benefits of, or be[en] subjected to discrimination under' that educational program in violation of Title IX." Pet. App. 75a (internal quotation marks and brackets in original).

One panel member dissented, arguing that Title IX did not apply because petitioner did not allege that respondent or any of its employees had committed an act of harassment against LaShonda. Pet. App. 80a.

b. The Eleventh Circuit granted rehearing en banc, vacated the panel's opinion, and affirmed the district court's judgment dismissing the complaint. Pet. App. 91a-92a, 1a-45a. The en banc majority construed petitioner's complaint to allege that LaShonda had been subjected to hostile environment sexual harassment, that one teacher knew of at least four instances of harassment, that at least two other teachers and the

principal each knew of at least two incidents of harassment, and that respondent took no action except to threaten G.F. with disciplinary action. *Id.* at 6a-7a & n.6. But it concluded that Title IX does not impose upon school officials any obligation "to take measures sufficient to prevent a *non-employee* from discriminating" on the basis of sex against a student. *Id.* at 22a. The en banc court characterized petitioner's claim as "seeking direct liability of the Board for the wrongdoing of a student." *Id.* at 10a. The en banc court reasoned that Congress enacted Title IX under its Spending Clause power and that Title IX gave educational institutions that receive federal funds notice that "they must prevent their employees from themselves engaging in intentional gender discrimination," *id.* at 21a, but not that they could be liable for failing to prevent one student from sexually harassing another, *id.* at 19a.<sup>3</sup>

Four members of the court dissented, Pet. App. 46a-61a, arguing that the plain language of Title IX makes it clear that "liability hinges upon whether the grant recipient maintained an educational environment that excluded any person from participating, denied them benefits, or subjected them to discrimination," because of sex, *id.* at 47a. The dissent noted that this construction of the statute is supported by the interpretation of the Department of Education, Office for Civil Rights

---

<sup>3</sup> The author of the opinion for the en banc court, Judge Tjoflat, included two sections that were not joined by any other member of the court: a discussion of the due process rights of alleged harassers and possible suits by disciplined harassers, Pet. App. 22a-29a (Part III.B), and a discussion of the possible number of lawsuits involving harassment by fellow students, *id.* at 30a-32a (Part III.C). See *Id.* at 33a; *id.* at 36a & n.1 (opinion of Carnes, J., concurring specially).



(OCR), an agency charged with enforcing Title IX, which states:

[A] school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. . . . Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its *own* discrimination in failing to remedy it once the school has notice.

*Id.* at 48a (quoting Sexual Harassment Guidance, 62 Fed. Reg. 12,034, 12,039-12,040 (1997)). The dissent disagreed with the majority's reliance on the absence of a discussion of student-on-student harassment in the legislative history of Title IX because a failure to mention it in congressional debate "does not mean that it was not encompassed within Congress's broad intent of preventing students from being 'subjected to discrimination' in federally funded educational programs." Pet. App. 50a. The dissent pointed out that, under the majority's narrow interpretation, the cause of action under Title IX recognized by the Court in *Franklin* would not be supported because it also was not mentioned during congressional debate. *Ibid.* The dissent also reasoned that sufficient notice was provided to fund recipients to satisfy the Spending Clause prerequisite for damages under Title IX, because the plain meaning of the statute "unequivocally imposes liability on grant recipients for maintaining an educational environment in which students are subjected to discrimination." *Id.* at 51a. Here, where petitioner alleges that at least three teachers and the school principal had actual knowledge of the harassment and

took no meaningful action to end it, the dissenters believed that the district court's dismissal of the Title IX claims against the Board should have been reversed. *Id.* at 61a.

#### SUMMARY OF ARGUMENT

The court of appeals' ruling completely forecloses a private right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, whether for damages or equitable relief, for a school district's failure to respond to known sexual harassment of a student by another student. Such a categorical exclusion is inconsistent with this Court's decision in *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998), and with the plain meaning of the statute.

The lower courts erred in dismissing petitioner's Title IX claims. In *Gebser*, this Court held that a school district receiving federal financial assistance may be held liable in a private action for damages under Title IX as a result of sexual harassment of a student by a teacher if "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs" and responds with deliberate indifference. 118 S. Ct. at 1999. Under *Gebser*, a recipient's liability for damages in those circumstances is imposed not for the actions of the employee, based upon agency principles, but for the recipient's own refusal to remedy the hostile environment created by sexual harassment. That standard is equally applicable to a recipient's refusal to remedy a hostile environment created by repeated instances of sexual harassment of a student by another student. Because petitioner alleged that her daughter was subjected to repeated instances of sexual harass-

ment at school, that the school's principal and at least three teachers had actual knowledge of the harassment, and that they responded to her complaints with deliberate indifference, she has stated a claim for damages under *Gebser*.

Moreover, to the extent petitioner seeks equitable relief rather than damages, she may be entitled to relief even if her proof fails to meet the *Gebser* standard. The requirement of actual knowledge and deliberate indifference responds to concerns about subjecting a fund recipient to potential liability for money damages where the recipient is unaware of the discrimination in its programs and would be willing to institute prompt corrective measures. Because equitable relief does not present the same concerns, petitioner may establish a violation of Title IX and entitlement to equitable relief if she can show that LaShonda was subjected to a hostile environment in the school's programs or activities, respondent's officials knew or should have known of the harassment, and they failed to take prompt, appropriate corrective action. See Department of Education, Office for Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12,034, 12,039 (1997). The equitable relief petitioner seeks—an injunction requiring respondent to institute a policy providing guidance to its employees in the handling of sexual harassment complaints about fellow students, and prohibiting respondent from continuing to discriminate by failing to respond to sexual harassment complaints—requires nothing more of respondent than is already required by the statute and the Department of Education's long-standing Title IX regulations. Respondent could be required by the Department of Education to take such actions to bring itself into compliance with the statute and regulations as part of the statutorily-mandated

administrative effort to obtain compliance through voluntary means, 20 U.S.C. 1682, in order to avoid the ultimate filing of an administrative action to terminate federal financial assistance. Petitioner should likewise be able to obtain equitable relief in the private right of action that has been judicially implied.

### **ARGUMENT**

#### **PETITIONER HAS STATED A CLAIM UNDER TITLE IX FOR BOTH DAMAGES AND EQUITABLE RELIEF**

**A. Title IX, As Construed By This Court In *Gebser*, Provides An Implied Private Right Of Action For Damages Based On A Fund Recipient's Deliberate Indifference To Repeated Complaints About Severe And Pervasive Sexual Harassment Of A Student By Another Student In The Recipient's Education Programs And Activities.**

1. Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. 1681. The “discrimination” prohibited by Title IX includes sexual harassment. *Gebser*, 118 S. Ct. at 1995 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002-1003 (1998)); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992). An employee is “subjected to discrimination under” a federally funded education program in violation of Title IX if she is “forced to work under more adverse conditions” than male employees. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); cf. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (“disparate treatment of men and women in employment \* \* \* includes requiring people to work in a discriminatorily hostile or abusive en-



vironment"). Similarly, when a student is forced to attend school in a hostile or intimidating environment caused by pervasive sexual harassment known to the recipient, and that hostile educational environment adversely affects the student's ability to participate fully in or benefit from the education program in which the student is enrolled, the student is "excluded from participation in" and "denied the benefits of" the education program, and is "subjected to discrimination under" the program, and this is so whether the harasser is a teacher or a fellow student.

In *Gebser*, this Court addressed the circumstances in which an educational institution receiving federal funds may be held liable for damages in an implied private right of action under Title IX as a result of sexual harassment of a student by a teacher. The Court concluded that damages could be recovered in such a case only when "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs" and responds with deliberate indifference. 118 S. Ct. at 1999. The Court reasoned that, because Title IX's express remedial scheme for permitting termination of the federal funds received by a school through administrative enforcement is predicated on notice and an opportunity for the recipient to rectify a violation, Congress did not intend to subject recipients of federal financial assistance to damages liability in a private action when the recipient "was unaware of discrimination in its programs and is willing to institute prompt corrective measures." *Ibid.*

The *Gebser* Court's ruling about the educational institution's potential liability for damages did not depend upon the harasser's status as an employee. In

fact, the Court expressly rejected arguments that liability for damages could be based on agency principles of respondeat superior or constructive notice that result from the employer-employee relationship. 118 S. Ct. at 1995, 1997. Rather, the Court emphasized that the educational institution's liability for damages rests on its own "official decision \* \* \* not to remedy the violation," not on the independent actions of its harassing employees. *Id.* at 1999.

It follows from that analysis that when school officials know that severe or pervasive sexual harassment of a student is occurring in their education programs or activities, their decision not to exercise their authority to remedy the harassment perpetuates a hostile educational environment and they may be held liable in damages for that violation of Title IX, whether the student's harasser is a school employee or another student. In either case, the school officials are ultimately responsible for providing the benefits of the education programs and activities to all students without subjecting them to discrimination or exclusion on the basis of sex. In either case, the school officials have the authority to institute corrective measures, whether by disciplining, reassigning, excluding, or otherwise inducing a change in the behavior of the offender, or by offering the victim an alternative assignment. In either case, the official decision not to remedy the hostile educational environment means that the student is required to attend school in a discriminatorily hostile or abusive environment. This is particularly so in the case of elementary and secondary students who are subject to compulsory attendance laws, and frequently have no choice about what school they attend. Thus, when school officials respond with deliberate indifference to a known sexually hostile or

abusive environment in an education program or activity, they subject the harassed student to that environment in violation of Title IX, whether the harasser is a school employee or another student.

The identity of the harasser as a student rather than a teacher is irrelevant to the theory of liability set forth in *Gebser*. Indeed, the identity of the harasser may not always be known, as when a student finds an unrelenting barrage of sexually denigrating graffiti on his or her locker or athletic equipment, or finds sexually explicit cartoons referring to the student posted daily on the school walls. The harassed student may suffer the same impairment of educational opportunity, and the school officials may manifest the same deliberate indifference to the student's plight, whether the harassers are fellow students or school employees.

The court of appeals erroneously interpreted petitioner's claim as "seeking direct liability of the Board for the wrongdoing of a student," Pet. App. 10a, and concluded that, unlike *Franklin v. Gwinnett County Public Schools*, *supra*, which it interpreted as holding a school district liable for the actions of its employee, *id.* at 9a-10a, the school district could not be held liable in this case because the harassing student was not an employee, *id.* at 22a. But Title IX focuses on the relationship between the student and the education program or activity operated by the Title IX recipient, not on the identity of the harasser. See *Gebser*, 118 S. Ct. at 1999-2000; cf. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)). The statute holds the recipient responsible not for the acts of the harassing individuals, but for its "own actions and inaction in the face of its knowledge that the harassment was occurring." *Doe v. Univ. of*

*Illinois*, 138 F.3d 653, 662 (7th Cir. 1998), petition for cert. pending, No. 98-126.<sup>4</sup> Thus, the Department of Education's Title IX Sexual Harassment Guidance makes clear that "Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice." 62 Fed. Reg. at 12,040; see also *Doe*, 138 F.3d at 667 (noting that Guidance reflects longstanding policy of Department of Education as demonstrated by official Letters of Finding dating back to 1989 (copies filed in court of appeals below)).

Differences between students and teachers may of course be relevant to determining an institution's liability in damages for its failure to respond adequately to incidents of sexual harassment. The words or actions of a child may not have the same meaning and impact as the words or actions of an adult teacher. Thus, the identity of the harasser and the social context in which the incident occurs may be relevant to determining whether the harassment is sufficiently severe, persistent, or pervasive to constitute actionable harassment. See *Oncale*, 118 S. Ct. at 1002-1003.<sup>5</sup> Similarly, because schools' means of controlling the actions of employees

---

<sup>4</sup> As Judge Easterbrook has observed, "failure to protect pupils from private aggression is a species of discrimination. This is the original meaning of equal protection of the laws." *Doe*, 138 F.3d at 678 (statement respecting the denial of rehearing en banc).

<sup>5</sup> As the initial panel below emphasized, "a hostile environment in an educational setting is not created by a simple childish behavior or by an offensive utterance, comment, or vulgarity." Pet. App. 76a. The panel recognized that a hostile educational environment is created only "when the [educational environment] is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's [environment] and create an abusive



differ from their means of controlling the actions of students, the harasser's status in relation to the school may be relevant in determining whether officials' response to harassment was deliberately indifferent.<sup>6</sup> Thus, although such issues will need to be resolved on a case-by-case basis, differences between students and employees do not justify the court of appeals' rule that, as a categorical matter, an educational institution has no obligation under Title IX to respond to complaints of sexual harassment because the harasser is another student.

2. The court of appeals erred in ruling that a school district cannot be held responsible under Title IX for failing to respond to harassment of one student by another because, in the court of appeals' view, Title IX gave recipients of federal funds notice only that "they must prevent their employees from themselves engaging in intentional gender discrimination," Pet. App. 21a,

---

environment.'" *Id.* at 76a-77a (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)) (citation omitted).

Nor does every interaction between students occur "under [the] education program or activity receiving Federal financial assistance." 20 U.S.C. 1681. A recipient's liability for failing to respond appropriately is limited to student-on-student sexual harassment that "takes place while the students are involved in school activities or otherwise under the supervision of school employees." *Doe v. Univ. of Illinois*, 138 F.3d 653, 661 (7th Cir. 1998), petition for cert. pending, No. 98-126.

<sup>6</sup> As the Seventh Circuit explained in *Doe*, 138 F.3d at 667-668, school officials who learn of sexual harassment must choose "from a range of responses," and "it should be enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit." See 62 Fed. Reg. at 12,042.

and not that fund recipients could be liable for failing to prevent one student from sexually harassing another, *ibid.* The court's rationale for distinguishing between the two situations was based on its view that a fund recipient is directly liable as an employer for its employees' discrimination, but that a recipient cannot be held directly liable for a student's wrongdoing. *Id.* at 10a. That distinction cannot, however, survive *Gebser's* explanation that a fund recipient can be held responsible for harassment by teachers not because of vicarious responsibility for the acts of employees but only because of its inaction in response to known sexual harassment of one of its students. Thus, following *Gebser*, there is no support for the distinction drawn by the court of appeals.

Moreover, the antidiscrimination mandate of Title IX is clear, and it provides fund recipients with ample notice of their obligations under the statute. In this respect, Title IX stands in sharp contrast with the merely precatory language that was held insufficient to impose an obligation on fund recipients in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Cf. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 286 n.15 (1987) (noting that "[t]he contrast between the congressional preference at issue in *Pennhurst* and the antidiscrimination mandate of § 504 [of the Rehabilitation Act of 1973, 29 U.S.C. 794] could not be more stark"). As *Gebser* recognized, Title IX put fund recipients on notice that, as a condition of federal funding, they must respond appropriately to known sexual harassment of students in their programs and activities that excludes students from participating in, or denies them the benefits of, those education programs and activities. As this Court observed in *Bennett v. Kentucky Department of Education*, 470

U.S. 656, 666, 669-670 (1985), the government's failure to "prospectively resolve every possible ambiguity concerning particular applications" of the statutory requirements of a federal funding education program did not undermine the adequacy of notice given to a funding recipient concerning its statutory obligations, particularly because "grant recipients had an opportunity to seek clarification of the program requirements." And, as the Seventh Circuit correctly ruled, prior to *Gebser*:

If, as alleged, school \* \* \* officials knew about the [student-on-student] harassment and intentionally failed, and indeed flatly refused in some instances, to take steps to address it, then the plea that the institution was not "on notice" that such failure could subject it to Title IX liability rings hollow.

*Doe*, 138 F.3d at 663.

In any event, *Gebser*'s requirement that, for purposes of recovering damages, a plaintiff must prove not only that a recipient knew of the sexual harassment, but also was deliberately indifferent to it, ensures that a recipient is liable for monetary damages only for its own deliberate perpetuation of discrimination prohibited by statute.

3. Petitioner's allegations meet the *Gebser* standard. Petitioner alleges that her daughter was subjected to repeated incidents of sexual harassment by another student while at school, Pet. App. 95a-97a, that three teachers and the principal of the school had actual knowledge of the harassment, *id.* 96a-98a, that the harassment occurred while the students were "under the supervision of teachers," *id.* at 96a, that the principal "was responsible for supervising discipline of the students in his school," *id.* at 98a, and that respon-

dent responded with deliberate indifference to her complaints, *id.* at 100a. Thus, the complaint fairly alleges that "official[s] of the recipient entity with authority to take corrective action to end the discrimination" had actual knowledge of the harassment and failed to act to stop it. *Gebser*, 118 S. Ct. at 1999. Thus, the lower courts erred in dismissing petitioner's complaint.

**B. Petitioner's Allegations Need Not Meet The *Gebser* Standard To Support A Claim For Equitable Relief**

Even if petitioner's proof on remand fails to meet the *Gebser* standard of actual knowledge and deliberate indifference, petitioner may nonetheless be able to establish an entitlement to equitable relief for a Title IX violation under a less demanding standard. Unlike the plaintiff in *Gebser*, who sought only damages, petitioner here also sought an injunction ordering respondent "to institute a policy providing guidance for employees in the event of sexual harassment of students by fellow students" and enjoining respondent "from discriminating against female students by failing to respond to complaints of sexual harassment." Pet. App. 102a. Entry of the injunction would, in essence, command respondent to comply with existing legal obligations under the federal statute and regulations; therefore, it does not raise the same concerns as did a potential award of damages in *Gebser*.

Injunctive and other equitable relief has been available in a private action under Title IX, without the showing of actual knowledge and deliberate indifference required by *Gebser* as a prerequisite for damages, since this Court first recognized a private right of action in 1979. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 705 & n.38, 710 n.44, 711-712 (1979); see *Gebser*, 118



S. Ct. at 1997-1998 (citing same). Unlike damages, equitable relief does not raise the Court's "central concern" under the Spending Clause<sup>7</sup> that a federal fund recipient be on notice of its exposure to liability for a monetary award. *Gebser*, 118 S. Ct. at 1998 (discussing central concern underlying *Pennhurst*, *Franklin*, and *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983)). And unlike damages for past violations, equitable relief that is a condition on future funding can be avoided by the recipient by withdrawing from the federal funding program.

Moreover, this distinction between the standard for damages and the standard for injunctive relief is consistent with the analysis, set forth in *Gebser*, that the express statutory scheme for administrative enforce-

<sup>7</sup> Although *Franklin* left open the question whether Title IX was enacted exclusively pursuant to the Spending Clause, 503 U.S. at 75 n.8, other decisions of this Court reflect the view that Title IX (like Title VI and Section 504 of the Rehabilitation Act, which are similar federal funding statutes with nondiscrimination conditions) was enacted pursuant to Section 5 of the Fourteenth Amendment. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982) (assuming that Title IX is Section 5 legislation); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 686 n.7 (1979) (noting Congress's reference to its enforcement responsibilities under the Fourteenth Amendment as justification for including Titles VI and IX in the amendment to the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. 1988); cf. *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472 n.2 (1987) (Section 504); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 244 n.4 (1985) (Section 504); *United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6 (1979) (contrasting Title VI with Title VII, which was "not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments"); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) (in context of dismantling former dual system of higher education, protections of Title VI extend no further than the Fourteenth Amendment).

ment provides guidance for inferring congressional intent with regard to the implied private right of action. Title IX expressly creates an enforcement mechanism that anticipates and encourages resort to equitable remedies before the recipient has manifested the extreme intransigence that warrants resort to the ultimate administrative sanction of terminating federal funds.

The administrative enforcement scheme created by Congress begins with notice to the recipient of its violation. 20 U.S.C. 1682.<sup>8</sup> An agency can take further action only after it determines that "compliance cannot be secured by voluntary means." *Ibid.* An agency's efforts to obtain compliance by voluntary means may

<sup>8</sup> The Department of Education's standard for establishing a violation of Title IX in a sexual harassment case involving student-on-student harassment requires a showing that:

- (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.

62 Fed. Reg. at 12,039; *id.* at 12,037 ("[C]onstructive notice is applicable only if a school ignores or fails to recognize overt or obvious problems of sexual harassment. Constructive notice does not require a school to predict aberrant behavior.") When school officials know or should know that a sexually hostile environment exists in their education programs or activities, their failure to exercise their authority to take appropriate corrective action subjects the victim to discrimination, and may deny her the benefits of its education programs and activities in violation of Title IX. That rationale is consistent with the Department's longstanding investigative guidance on racial harassment. See 59 Fed. Reg. 11,448-11,454 (1994); *id.* at 11,449. Although, under *Gebser*, a damages award would not be appropriate without proof of actual knowledge and deliberate indifference, equitable relief may be warranted for the reasons discussed in this brief.

include a variety of equitable solutions. The Department of Education's longstanding regulations, promulgated pursuant to express authority delegated by Congress to effectuate Title IX (see 20 U.S.C. 1682),<sup>9</sup> provide that administrative compliance efforts may include conditioning a recipient's continued funding on its providing equitable relief to a victim of discrimination. 34 C.F.R. 106.3. The Court in *Gebser* expressly recognized the availability of such equitable relief under the administrative scheme. 118 S. Ct. at 1998 (citing 34 C.F.R. 106.3, as well as *North Haven*, 456 U.S. at 518, where agency conditioned continued funding on reinstatement of employee who had been subjected to sex discrimination). In fact, the Department of Education's regulations require that each potential recipient submit to the Department, along with its application for federal financial assistance, an "assurance of compliance" stating that its education programs and activities will be operated in compliance with the Department's regulations and that it will commit itself to, *inter alia*, "take whatever remedial action is necessary in accordance with § 106.3(a) to

<sup>9</sup> Pursuant to Section 431(d)(1) of the General Education Provisions Act, as added by Education Amendments of 1974, Pub. L. No. 93-380, § 509(a)(2), 88 Stat. 567, 20 U.S.C. 1232(d)(1) (1970 & Supp. IV 1974), these regulations were submitted to Congress when they were issued on June 4, 1975, by the Department of Health, Education, and Welfare, 40 Fed. Reg. 24,128 (1975), and did not become effective until 45 days later, after Congress failed to exercise its authority to disapprove them during that period, see 45 C.F.R. Pt. 86 (1975); see also *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 531-532 (1982). Because of this unique history, the Court has accorded the Title IX regulations particular deference as an interpretation of the statute. See *Grove City College v. Bell*, 465 U.S. 555, 567-568 (1984).

eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination." 34 C.F.R. 106.4(a). Such equitable relief may also include, in the case of a sexually hostile environment created by the sexual harassment of a student by a teacher, "the offending teacher's resignation and the district's institution of a grievance procedure for sexual harassment complaints." *Gebser*, 118 S. Ct. at 1998 (noting that, in *Franklin*, 503 U.S. at 64 n.3, the Department of Education had identified a Title IX violation but concluded that the recipient had come into compliance when the offending teacher resigned and the recipient instituted a sexual harassment grievance procedure).<sup>10</sup>

<sup>10</sup> The Department of Education's regulations require that federal fund recipients notify students, parents, and employees of the Title IX prohibition against sex discrimination in its education programs and activities, 34 C.F.R. 106.9(a), and "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" alleging any violation of Title IX or the regulations, 34 C.F.R. 106.8(b). Recipients also must designate a Title IX coordinator to handle complaints and investigations and identify that person to all students and employees as the person to whom questions about Title IX should be referred. 34 C.F.R. 106.8(a), 106.9(a). Although violation of the grievance procedure regulations "does not itself constitute 'discrimination' under Title IX," *Gebser*, 118 S. Ct. at 2000, and would not satisfy the requirements for a damages award, evidence of such a violation, as alleged by petitioner in this case, Pet. App. 98a, could warrant injunctive relief in a private action if it was shown that it contributed to the plaintiff's injury. The Department of Education has detailed the features of an effective nondiscrimination policy and grievance process, 62 Fed. Reg. at 12,044-12,045, and has emphasized that they provide schools with not only an effective means of responding to sexual harassment, but also "an excellent mechanism to be used in their efforts to prevent



Only after such efforts at achieving compliance through voluntary and equitable solutions have failed, can an agency commence administrative action to terminate federal funding. 20 U.S.C. 1682. In addition, before taking action to terminate, or refuse to grant or continue, federal financial assistance, the agency must afford the recipient an opportunity for a hearing and the agency must make an express finding on the record of the recipient's failure to comply with the relevant statutory or implementing regulatory requirement. *Ibid.*

Thus, it is clear that, under the administrative enforcement scheme, a violation of Title IX may trigger an obligation on the part of the recipient to take remedial action before the recipient has demonstrated the extreme intransigence required to terminate funding, *i.e.*, the showing that the *Gebser* Court analogized to deliberate indifference. See 118 S. Ct. at 1999. A plaintiff in a private enforcement action should likewise be entitled to equitable relief without a showing of deliberate indifference. As this Court recognized in *Cannon*, 441 U.S. at 705-706, because of the limited government resources available for the enforcement of Title IX, "[t]he award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some

---

sexual harassment before it occurs," *id.* at 12,038.

By contrast, evidence that a fund recipient has in place an effective and adequately publicized policy and grievance procedure may constitute an affirmative defense in a Title IX suit if the recipient establishes that the plaintiff suffered avoidable harm because she unreasonably failed to avail herself of the preventive and remedial measures. See *Gebser*, 118 S. Ct. at 2007 (Ginsburg, J., joined by Souter, Breyer, JJ., dissenting).

cases even necessary to—the orderly enforcement of the statute." See also *id.* at 706-708 & nn. 41, 42.

### CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

SETH P. WAXMAN  
Solicitor General

BILL LANN LEE  
Acting Assistant Attorney  
General

BARBARA D. UNDERWOOD  
Deputy Solicitor General

BETH S. BRINKMANN  
Assistant to the Solicitor  
General

DENNIS J. DIMSEY  
LINDA F. THOME  
Attorneys

NOVEMBER 1998

9  
No. 97-843

**FILED**

**NOV 10 1998**

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

In The  
**Supreme Court of the United States**  
October Term, 1998

AURELIA DAVIS, as next friend of LASHONDA D.,  
*Petitioner,*  
vs.

MONROE COUNTY BOARD OF EDUCATION, et al.,  
*Respondents.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Eleventh Circuit

**BRIEF AMICI CURIAE**  
**IN SUPPORT OF PETITIONER**  
[Amici Listed On Inside Cover]

HORVITZ & LEVY LLP  
DAVID S. ETTINGER  
LISA R. JASKOL  
MARY-CHRISTINE SUNGAILA\*  
\*Counsel of Record  
15760 Ventura Boulevard,  
18th Floor  
Encino, California 91436-3000  
(818) 995-0800

NOW LEGAL DEFENSE  
AND EDUCATION FUND  
MARTHA F. DAVIS  
JULIE GOLDSCHIED  
YOLANDA S. WU  
99 Hudson Street,  
12th Floor  
New York, New York  
10013-2871  
(212) 925-6635

*Attorneys for Amici Curiae*



---

NOW LEGAL DEFENSE AND EDUCATION FUND,  
AMERICAN ASSOCIATION OF UNIVERSITY  
WOMEN, AMERICAN JEWISH CONGRESS  
COMMISSION FOR WOMEN'S EQUALITY,  
CALIFORNIA WOMEN'S LAW CENTER, CENTER  
FOR ADVANCEMENT OF PUBLIC POLICY, CENTER  
FOR WOMEN POLICY STUDIES, CONNECTICUT  
WOMEN'S EDUCATION AND LEGAL FUND, INC.,  
EQUAL RIGHTS ADVOCATES, FEMINIST  
MAJORITY FOUNDATION, LAMBDA LEGAL  
DEFENSE AND EDUCATION FUND, MS.  
FOUNDATION FOR WOMEN, MYRA SADKER  
ADVOCATES FOR GENDER EQUITY, NATIONAL  
ALLIANCE OF SEXUAL ASSAULT COALITIONS,  
NATIONAL ASSOCIATION FOR GIRLS AND  
WOMEN IN SPORT, NATIONAL COALITION FOR  
SEX EQUITY IN EDUCATION, NATIONAL  
ORGANIZATION FOR WOMEN FOUNDATION,  
NATIONAL WOMEN'S HISTORY PROJECT,  
NORTHWEST WOMEN'S LAW CENTER,  
SURVIVORS OF EDUCATOR SEXUAL ABUSE AND  
MISCONDUCT EMERGE, INC., TEXAS CIVIL  
RIGHTS PROJECT, TITLE IX ADVOCACY PROJECT,  
TITLE IX ADVOCATES, THE UNITED STATES  
STUDENT ASSOCIATION, WOMEN &  
PHILANTHROPY, WOMEN EMPLOYED, WOMEN  
LAWYERS ASSOCIATION OF LOS ANGELES, THE  
WOMEN'S LAW CENTER OF MARYLAND, INC.,  
AND WOMEN'S LAW PROJECT

---

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	1
STATEMENT OF THE CASE .....	3
ARGUMENT .....	4
I. PEER SEXUAL HARASSMENT THAT CREATES A DISCRIMINATORY ENVIRONMENT HAS A DIRECT AND DEVASTATING IMPACT ON STUDENTS' EDUCATIONAL OPPOR- TUNITIES, EMOTIONAL DEVELOPMENT, AND LONG-TERM SUCCESS .....	4
II. WHEN THEY IGNORE PEER SEXUAL HARASSMENT, SCHOOLS COMPOUND THE HARM AND FOSTER SEX-BASED DISCRIMI- NATION IN VIOLATION OF TITLE IX .....	14
III. WHEN SCHOOLS TOLERATE, CONDONE, OR REFUSE TO REMEDY PEER SEXUAL HARASS- MENT, THEY TEACH STUDENTS THAT SEX- UAL HARASSMENT OF THEIR PEERS IS ACCEPTABLE, A LESSON THAT STUDENTS ARE APT TO TAKE WITH THEM INTO THE WORKING WORLD .....	20
CONCLUSION .....	26
APPENDIX .....	A-1



## TABLE OF AUTHORITIES

## Page

## CASES

Andrews v. City of Philadelphia 895 F.2d 1469 (3d Cir. 1990).....	20
Bethel Sch. Dist. No. 403 v. Fraser 478 U.S. 675 [106 S. Ct. 315a, 92 L.Ed.2d 659] (1986).....	24
Brown v. Board of Educ. 347 U.S. 483 [74 S. Ct. 686, 98 L.Ed. 873] (1954).....	5, 14, 23, 25
Brzonkala v. Virginia Polytechnic Inst. 132 F.3d 949 (4th Cir. 1997) vacated and reh'g en banc granted, No. 96-1814 (Feb. 5, 1998).....	8
Burlington Indust., Inc. v. Ellerth ___ U.S. ___ [118 S. Ct. 2257, 141 L.Ed.2d 633] (1998).....	4
Burrow v. Postville Community Sch. Dist. 929 F. Supp. 1193 (N.D. Iowa 1996).....	8
Cannon v. University of Chicago 441 U.S. 677 [99 S. Ct. 1946, 60 L.Ed.2d 560] (1979).....	25
Clyde K. v. Puyallup Sch. Dist. No. 3 35 F.3d 1396 (9th Cir. 1994).....	5
Collier v. William Penn Sch. Dist. 956 F. Supp. 1209 (E.D. Pa. 1997).....	7
Davis v. Monroe County Bd. of Educ. 74 F.3d 1186 (11th Cir.), vacated, 91 F.3d 1418 (11th Cir. 1996), rev'd en banc, 120 F.3d 1390 (11th Cir. 1997).....	4
Davis v. Monroe County Bd. of Educ. 120 F.3d 1390 (11th Cir. 1997).....	6

## TABLE OF AUTHORITIES - Continued

## Page

Doe v. Petaluma City Sch. Dist. 830 F. Supp. 1560 (N.D. Cal. 1993), reconsid. granted, 949 F. Supp. 1415 (N.D. Cal. 1996).....	13
Doe v. Petaluma City Sch. Dist. 949 F. Supp. 1415 (N.D. Cal. 1996).....	24
Doe v. University of Illinois 138 F.3d 653 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3126 (U.S. Aug. 18, 1998) (No. 98-126).....	21
EEOC v. Hacienda Hotel 881 F.2d 1504 (9th Cir. 1989).....	21
Faragher v. City of Boca Raton ___ U.S. ___ [118 S. Ct. 2275, 141 L.Ed.2d 662] (1998).....	4
Franklin v. Gwinnett County Pub. Sch. 503 U.S. 60 [112 S. Ct. 1028, 117 L.Ed.2d 1028] (1992).....	4
Gebser v. Lago Vista Indep. Sch. Dist. ___ U.S. ___ [118 S. Ct. 1989, 141 L.Ed.2d 277] (1998).....	1, 2, 4, 25
Hall v. Gus Constr. Co. 842 F.2d 1010 (8th Cir. 1988).....	21
Harris v. Forklift Sys. 510 U.S. 17 [114 S. Ct. 367, 126 L.Ed.2d 295] (1993).....	4, 20
Henson v. City of Dundee 682 F.2d 897 (11th Cir. 1982).....	21
Jenson v. Eveleth Taconite Co. 824 F. Supp. 847 (D. Minn. 1993).....	21

## TABLE OF AUTHORITIES - Continued

## Page

Meritor Sav. Bank, FSB v. Vinson 477 U.S. 57 [106 S. Ct. 2399, 91 L.Ed.2d 49] (1986) .....	4
Monteiro v. Tempe Union High Sch. Dist. No. 97-15511, 1998 U.S. App. LEXIS 26566 (9th Cir. Oct. 19, 1998) .....	5
Nicole M. v. Martinez Unified Sch. Dist. 964 F. Supp. 1369 (N.D. Cal. 1997) .....	7
Oncale v. Sundowner Offshore Servs., Inc. ___ U.S. ___ [118 S. Ct. 998, 140 L.Ed.2d 201] (1998) .....	2, 20
Patricia H. v. Berkeley Unified Sch. Dist. 830 F. Supp. 1288 (N.D. Cal. 1993) .....	5

## STATUTES

Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C.A. § 2000e-2(a)(1) (West 1994) .....	2
Title IX of the Education Amendments of 1972, 20 U.S.C.A. §§ 1681-1688 (West 1990 & Supp. 1998) .....	1

## REGULATIONS

Department of Education, Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, 62 Fed. Reg. 12,304 (1997) .....	9
--	---

## TABLE OF AUTHORITIES - Continued

## Page

## MISCELLANEOUS

The American Assoc. of Univ. Women Educ. Found., <i>Hostile Hallways: The AAUW Survey On Sexual Harassment in America's Schools</i> (1993) .....	9, 10, 22
Susan Fineran & Larry Bennett, <i>Teenage Peer Sexual Harassment: Implications for Social Work Practice in Education</i> , 43 Social Work 55 (1998) .....	12, 13
Jean O'Gorman Hughes & Bernice Resnick Sandler, <i>Peer Harassment: Hassles for Women on Campus</i> (Center for Women Policy Studies 1988) .....	21, 24
Permanent Commission on the Status of Women et al., <i>In Our Own Backyard: Sexual Harassment in Connecticut's Public High Schools</i> (1995) .....	15, 21
Claire Robertson et al., <i>Campus Harassment: Sexual Harassment Policies and Procedures at Institutions of Higher Learning</i> , 13 Signs: Journal of Women and Culture in Society, 792 (1988) .....	12
Myra & David Sadker, <i>Failing at Fairness: How America's Schools Cheat Girls</i> (Scribner & Sons 1994) .....	13
Bernice Resnick Sandler, <i>Student-To-Student Sexual Harassment</i> , in <i>Sexual Harassment on Campus: A Guide for Administrators, Faculty and Stu- dents</i> (Bernice R. Sandler and Robert J. Shoop eds., 1997) .....	22, 23
Bernice R. Sandler & Robert J. Shoop, <i>What Is Sexual Harassment?</i> , in <i>Sexual Harassment on Campus: A Guide for Administrators, Faculty, and Students</i> (Bernice R. Sandler & Robert J. Shoop eds., 1997) .....	12



## TABLE OF AUTHORITIES – Continued

## Page

Nan Stein et al., <i>Secrets in Public: Sexual Harassment in Our Schools</i> (1993) .....	11, 12, 16, 17, 18
Nan Stein & Hamilton Fish Nat'l Inst. on School and Community Violence, <i>Incidence of Sexual Harassment and Sexual Violence in K-12 Schools</i> (forthcoming 1998) .....	7, 10, 15, 19
Mary Trigg & Kim Wittenstrom, 'That's The Way The World Really Goes': <i>Sexual Harassment and New Jersey Teenagers</i> ; 52 <i>Initiatives</i> 55 (1996).....	13
Jerry Useem, <i>Harvard Business School's "Woman Problem," Inc. Magazine</i> , June 1998, 35 .....	23

## INTEREST OF AMICI CURIAE

*Amici curiae* are organizations strongly committed to achieving equality for all people in education, regardless of sex. Each therefore has an abiding interest in ensuring the sound interpretation and application of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (Title IX), which prohibits discrimination and denial of educational benefits on the basis of sex. Descriptions of the individual organizations are set forth in the attached Appendix.

*Amici* have the consent of the parties to file this brief.<sup>1</sup> Letters of consent have been filed separately with the Court.

---

 SUMMARY OF ARGUMENT

Title IX prohibits the denial of educational benefits and discrimination under any federally funded education program or activity. This Court recognized last Term that sexual harassment of a student by a teacher causes "extraordinary harm" that "undermines the basic purposes of the educational system," and that when a school is deliberately indifferent to such harassment, it denies students equal educational benefits and engages in sex discrimination in violation of Title IX. *Gebser v. Lago Vista*

---

<sup>1</sup> This brief was authored by the *amici* and counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than the *amici* or their counsel made any monetary contribution to the preparation or submission of this brief.

*Indep. Sch. Dist.*, 118 S. Ct. 1989, 2000 (1998). This Court has also held that when employers fail to address known sexual harassment of peers in the workplace, they engage in sex discrimination in violation of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-2(a)(1) (1994)). See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1000-01, 1003 (1998). This case now requires the Court to decide whether schools may be liable under Title IX for knowingly failing to address sexual harassment of one student by another.

Petitioner's brief explains that the laws of Congress and the Court's precedents require schools to address and remedy teacher and student harassment as forms of discrimination under Title IX and that, as with coworker harassment under Title VII, peer sexual harassment in schools can lead to liability under Title IX. This brief does not repeat those discussions. Rather, we show that, just as when sexual harassment of a student is committed by a teacher, a school's refusal to remedy peer sexual harassment constitutes a form of discrimination that causes "extraordinary harm" to the harassed student and "undermines the basic purposes of the educational system." *Gebser*, 118 S. Ct. at 2000.

Schools play a significant role in perpetuating the harm from peer sexual harassment. The harassment itself causes the student's education to suffer and causes serious emotional damage, as well as attendant physical problems. This harm is compounded when the school then ignores or refuses to remedy the harassment.

Further, by ignoring or otherwise failing to respond to peer sexual harassment, schools teach students that sexual harassment is acceptable behavior, and thereby "undermine[ ] [a] basic purpose[ ] of the educational system" (*id.*): preparing students for the adult workplace. Harassers who are not taught that sexual harassment is inappropriate are apt to continue their behavior throughout their school careers – creating hostile environments at middle schools, high schools, colleges, and graduate schools – and then to repeat it in the workplace. Accordingly, by failing to take reasonable steps to prevent discrimination in school and to educate students about the inappropriateness of sexual harassment, schools not only violate Title IX, they fall short of their broad educational mandate and ill-prepare their students for the realities of the work world.

---

#### STATEMENT OF THE CASE

*Amici* hereby adopt and incorporate by reference the Statement of the Case set forth in Petitioner's brief.

---



## ARGUMENT

### I. PEER SEXUAL HARASSMENT THAT CREATES A DISCRIMINATORY ENVIRONMENT HAS A DIRECT AND DEVASTATING IMPACT ON STUDENTS' EDUCATIONAL OPPORTUNITIES, EMOTIONAL DEVELOPMENT, AND LONG-TERM SUCCESS.

This Court has consistently recognized that sexual harassment, whether it occurs in the workplace or at school, causes serious discriminatory harm that often interferes substantially with the ability to work and learn, and that both workplaces and schools therefore must take reasonable steps to prevent its occurrence. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Harris v. Forklift Sys.*, 510 U.S. 17 (1993); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). The need to intervene is perhaps even more compelling when the harassment occurs at school rather than work. As the author of the Eleventh Circuit's panel opinion in this case noted: "The damage caused by sexual harassment . . . is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior." *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1193 (11th Cir.), *vacated*, 91 F.3d 1418 (11th Cir. 1996), *rev'd en banc*, 120 F.3d 1390 (11th Cir. 1997).

"Given the extremely harmful effects sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in

the classrooms and hallways of our schools." *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1401 (9th Cir. 1994). This is so because "[a] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program." *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1293 (N.D. Cal. 1993) (quoting Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 Tex. L. Rev. 525, 551 (1987)).

Likewise, this Court has long recognized the deleterious educational effects racial discrimination exacts on students. See *Brown v. Board of Educ.*, 347 U.S. 483, 493-95 (1954). Other courts have made similar observations. See, e.g., *Monteiro v. Tempe Union High Sch. Dist.*, No. 97-15511, 1998 U.S. App. LEXIS 26566, at \*37 (9th Cir. Oct. 19, 1998) ("It does not take an educational psychologist to conclude that being referred to by one's peers by the most noxious racial epithet in the contemporary American lexicon ["nigger"], being shamed and humiliated on the basis of one's race, and having the school authorities ignore or reject one's complaints would adversely affect a Black child's ability to obtain the same benefit from schooling as her white counterparts."). Discrimination in the form of sexual harassment (whether by a teacher or a fellow student) harms educational opportunities in ways similar to racial discrimination.

This case vividly demonstrates how peer sexual harassment harms students' education. In the classrooms and hallways of their elementary school, LaShonda D.'s

fifth-grade classmate G.F. repeatedly attempted to touch her breasts and vaginal area and made statements such as "I want to get in bed with you" and "I want to feel your boobs." (Pet. App. at 95a.) G.F. rubbed his body against LaShonda's in the hallway and simulated having sex with her during class. (*Id.* at 96a.) The school required LaShonda to sit next to G.F. in class for over three months after she first complained of this harassment. (*Id.* at 97a.) Both her and her mother's repeated complaints to school officials were ignored or even dismissed. (*Id.* at 96a-98a.) As a result of the harassment and the school's refusal to act, LaShonda could not concentrate on her school work, her attendance and participation in school activities decreased, her emotional health deteriorated, and her grades – previously all A's and B's – dropped. (*Id.* at 97a, 100a); *Davis v. Monroe County*, 120 F.3d 1390, 1394 (11th Cir. 1997); *id.* at 1418 (Barkett, J., dissenting).

LaShonda's experience is not unique among school-children. The reported cases reflect a variety of educational and emotional harm stemming from peer harassment. According to one expert:

Among the consequences of sexual harassment that have been [revealed] through lawsuits are: absenteeism; dropping out of a particular class/ or school; lower grades; sleeplessness and physical symptoms/complaints; fear of separation from adults, be they parents or school personnel (i.e., refusal to take the school bus; refusal to participate in recess; asking to stay in the classroom or be sent to the principal's or nurse's office during recess; refusal to eat lunch in the cafeteria and choosing to stay in the classroom or library during lunch); depression; weight

loss/gain; and threats to commit suicide. Students also expressed a reduction of trust towards adults and in their beliefs that school is a safe and fair environment; they felt betrayed, trivialized, and dismissed if and when they told school personnel about the incidents of sexual harassment that they had experienced.

Nan Stein, Hamilton Fish Nat'l Inst. On School and Community Violence, *Incidence of Sexual Harassment and Sexual Violence in K-12 Schools* (forthcoming 1998) (manuscript at 37-38, on file with authors) (adapted from *Between the Lines: Sexual Harassment in K-12 Schools* (Teacher's College Press 1998)) [hereinafter *Incidence of Sexual Harassment*].

Many cases graphically illustrate the types of sexually hostile environments created at the hands of other students:

- From the seventh through ninth grades, Kellie Collier's ability to learn was inhibited by peer sexual harassment including a male student exposing his penis to Kellie, grabbing her breast, and using offensive language, sexual innuendo, sexual propositions, and threats of physical harm. *Collier v. William Penn Sch. Dist.*, 956 F. Supp. 1209, 1211-12 (E.D. Pa. 1997).
- Nicole M., a junior high school student, transferred to a different school as a result of peer sexual harassment consisting of a male student touching Nicole's breast during class and making repeated unwanted verbal comments regarding her breast and figure in general. *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1372 (N.D. Cal. 1997).



- Lisa Burrow, a high school student, avoided school and ultimately was forced to graduate early as the result of peer sexual harassment that included a male student repeatedly kicking her between the legs, students yelling obscenities at her, and threats being made to her life. *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193, 1196-97, 1205-06 (N.D. Iowa 1996).
- A college student was gang raped by other students. As a result, her "behavior changed radically. She became depressed and avoided contact with her classmates and residents of her dormitory. . . . She ceased attending classes and eventually attempted suicide. . . . She later sought and received a retroactive withdrawal from [her college] for the . . . academic year because of the trauma." *Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 953 (4th Cir. 1997), *vacated and reh'g en banc granted*, No. 96-1814 (Feb. 5, 1998).

The Office for Civil Rights (OCR) of the Department of Education, the agency charged with enforcing compliance with Title IX, also recognizes the grave harm to students' educations that results from peer sexual harassment and treats it just like other forms of sexual harassment that violate Title IX:

Through its enforcement of Title IX, OCR has learned that a significant number of students, both male and female, have experienced sexual harassment, that sexual harassment can interfere with a student's academic performance and emotional and physical well-being, and that preventing and remedying sexual harassment in

schools is essential to ensure nondiscriminatory, safe environments in which students can learn.

Department of Education, Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, 62 Fed. Reg. 12,034, 12,304 (1997). In particular, OCR reports that students who have been sexually harassed may experience "difficulty concentrating on academic work, symptoms of depression, and a desire to avoid certain individuals and places at school." *Id.* at 12,041. "[Their] grades may go down or the student may be forced to withdraw from school because of the harassing behavior." *See id.* at 12,041 & 12,049 nn.48, 51 (citing cases reported to OCR in which a girl's grades dropped while harassment was occurring, students left school due to harassment, and several girls were afraid to go to school because of harassment).

Numerous studies further document the direct correlation between peer harassment and decreased educational achievement, as well as harm to students' emotional development. The landmark 1993 nationwide peer harassment study commissioned by the American Association of University Women Educational Foundation (AAUW), for example, found that more than one in five students who had been sexually harassed by their fellow students wanted to avoid school, stayed home or cut classes, did not want to talk as much in class, and found it harder to pay attention in school after experiencing harassment. The American Assoc. of Univ. Women Educ. Found., *Hostile Hallways: The AAUW Survey On*

*Sexual Harassment in America's Schools* 15-16 (1993) [hereinafter *Hostile Hallways*]; *Incidence of Sexual Harassment*, *supra* at 37-38.

The responses of individual students to this and other peer harassment surveys poignantly demonstrate the emotional turmoil and adverse educational impact that occur when students harass their fellow students:

"It made me feel cheap, like I was doing something I wasn't aware of to draw this kind of attention to myself. I could never stand up to him because [if] I told him to stop he'd threaten me, so I began to act like it didn't bother me(.) . . . He'd hit me (hard enough to bruise me twice) and then pin my arms behind my back till it hurt and push [me] against a wall and tell me all the awful things he would do to me if I ever hit him again, so I quit standing up to him again." [14-year-old girl from small town in Michigan.]

*Incidence of Sexual Harassment*, *supra* at 11.

"At first I didn't really think of it because it was considered a 'guy thing', but as the year went on, I started to regret going to school, especially my locker, because I knew if I went I was going to be cornered and be touched, or had [sic] some comment blurted out at me. I just felt really out of place and defenseless and there was nothing I could do." [14-year-old girl from Maryland.]

*Id.*

"My harassment came from one boy every day. Constantly. He was really into smacking my bottom, among other things and always asking me

to go to bed with him. There were tons of other guys, too. My freshman year was the worst and my sophomore year wasn't much better - there were two guys that were always bothering me the most at different times. I didn't want to go to school and I held resentment towards those who did that to me. I always told them to stop and even sometimes hit them. . . ." [14-year-old girl from Illinois.]

Nan Stein et al., *Secrets in Public: Sexual Harassment in Our Schools*, sec. (Who are the Harassers and Where Does the Harassment Happen?) (1993) [hereinafter *Secrets in Public*].

"Being sexually harassed at school made me feel upset, angry and violated. I mean, I shouldn't have to take this crap at school, should I? It's my right to go to school and not be harassed, isn't it? I feel confused because I wonder if all guys think those things about me! I feel insecure after this happens. I hate it. I shouldn't have to feel sexually intimidated by people who barely know me." [15-year-old girl from Vermont.]

*Id.*, sec. (How Do Girls and Young Women React?).

"There was this one particular day when the harassment was at an unusual high. I kept cool until the end of class. At the end of class I ran into the bathroom and locked the stall door. I started crying hysterically. One of my friends happened to see me and came in. She persuaded me to come out and go to class and the office. The boy was suspended and switched from the class. Although it was over and all I still felt withdrawn from that class. I think that if it would have went [sic] on any longer I would



have failed the class." [14-year-old girl from Michigan.]

*Id.*, sec. (*How Do Schools Respond?*).

Social scientists have similarly concluded that peer harassment causes extensive educational and emotional harm. Bernice R. Sandler and Robert J. Shoop, leading researchers on the subject, found that sexual harassment can seriously affect students' learning by causing "[f]eelings of helplessness, lack of control, shame, guilt, depression, anxiety, inability to concentrate, and difficulty in handling day-to-day tasks at . . . school. . . ." Bernice R. Sandler & Robert J. Shoop, *What is Sexual Harassment?*, in *Sexual Harassment on Campus: A Guide for Administrators, Faculty, and Students* 16 (Bernice R. Sandler & Robert J. Shoop eds., 1997). Likewise, the Indiana University Office of Women's Affairs concluded that sexual harassment "often disrupt[s] the educational process altogether; the affected student may drop a class or leave school. When students attempt to ignore or endure such a pattern of harassment, their academic performance, motivation, and sense of emotional well-being often suffer." Claire Robertson et al., *Campus Harassment: Sexual Harassment Policies and Procedures at Institutions of Higher Learning*, 13 *Signs: Journal of Women and Culture in Society* 792, 807 (1988); see also Susan Fineran & Larry Bennett, *Teenage Peer Sexual Harassment: Implications for Social Work Practice in Education*, 43 *Social Work* 55, 55 (1998) [hereinafter *Teenage Peer Sexual Harassment*] ("Many students report school performance difficulties as a result of sexual harassment, including absenteeism, decreased quality of schoolwork, skipping or dropping classes, lower grades, loss of friends, tardiness, and truancy.").

The harm caused by peer sexual harassment can last long after the students leave school. For example, lower grades resulting from inability to concentrate and perform in school can "lead to ineligibility for specific colleges or merit scholarships and loss of recommendations for awards, colleges, or jobs." *Teenage Peer Sexual Harassment*, *supra* at 55. Some students are forced out of school entirely by peer harassment. See *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1564-66, 1575 (N.D. Cal. 1993) ("Surely one is 'denied the benefits of, or subjected to discrimination under' an education program on the basis of sex when, as alleged here, she is driven to quit an education program because of the severity of the sexual harassment she is forced to endure in the program."), *reconsid. granted*, 949 F. Supp. 1415 (N.D. Cal. 1996); see also Myra & David Sadker, *Failing at Fairness: How America's Schools Cheat Girls* 115 (Scribner & Sons 1994) ("Girls exhibit the same symptoms as women who are persecuted by sexual harassment: They become withdrawn and fearful, feel intimidated, and may display the physical symptoms of illness. They often transfer out of courses or programs and sometimes drop out of school altogether."). As one researcher found, "[a]ll of these factors lead to fewer career choices and decreased or lost economic opportunities and possible job failure that can affect a student for the rest of her or his life." *Teenage Peer Sexual Harassment*, *supra* at 55; see also Mary Trigg & Kim Wittenstrom, *'That's The Way The World Really Goes': Sexual Harassment and New Jersey Teenagers*, 52 *Initiatives* 55, 63 (1996) (sexual harassment among teenage students "can . . . influence young peoples' abilities to learn, achieve, and excel"). In sum, peer sexual harassment –

like racial discrimination – “generates a feeling of inferiority as to [students’] status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Brown v. Board of Educ.*, 347 U.S. at 494.

## II. WHEN THEY IGNORE PEER SEXUAL HARASSMENT, SCHOOLS COMPOUND THE HARM AND FOSTER SEX-BASED DISCRIMINATION IN VIOLATION OF TITLE IX.

LaShonda D. alleges not only that she was persistently and severely harassed by another student, but that she and her mother consistently sought help from school officials to end the harassment and that their pleas were regularly ignored or even denigrated. It is that failure to intervene that is the basis for liability here. A school’s failure to respond to peer sexual harassment, as occurred here, officially sanctions the discrimination and further isolates and demeans the student, in this case a vulnerable fifth-grader.

LaShonda’s complaint exemplifies the ways a school compounds the discriminatory harm of peer sexual harassment by tolerating or condoning it. Despite repeated protests to a number of different school officials, the harassing student was not “suspended, kept away from LaShonda, or disciplined in any way. . . .” (Pet. App. at 97a.) LaShonda asked several times for the simple remedy of having her seat in one class moved so that she did not have to sit next to her harasser, but her requests were rejected until after she had complained for three months. (*Id.*) When LaShonda and her mother spoke with the principal after five months of harassment, his

response was to ask LaShonda why she was the only student complaining about G.F.’s behavior. (*Id.* at 96a-97a.)

Unfortunately, the school district’s response to LaShonda’s plight is not unique. Studies indicate school officials often ignore or refuse to respond to complaints of sexual harassment or, worse yet, directly fault *the victim*.<sup>2</sup> According to one scholar, “[s]tudents recognize that adults often witness episodes of sexual harassment, and expect adults to see and feel these violations as they do. Yet, many students (particularly the girls) cannot get confirmation of their experiences from school personnel because most of those adults do not name it ‘sexual harassment’ and do nothing to stop it.” *Incidence of Sexual Harassment, supra* at 35. A well-regarded Connecticut state agency survey found that 85 percent of school personnel who monitor Title IX compliance agree that “[s]tudent-to-student sexual harassment often goes unrecognized because it is too often dismissed as normal adolescent behavior.” Permanent Commission on the Status of Women et al., *In Our Own Backyard: Sexual Harassment in Connecticut’s Public High Schools* 21 n.7, 31 (1995) [hereinafter *In Our Own Backyard*].

Research also reflects that when schools respond to peer sexual harassment with indifference or ridicule, they “teach[ ] young women to suffer harassment and abuse privately. They learn that speaking up will not result in their being heard or believed and that if they insist on

<sup>2</sup> Studies also have concluded that fabricated sexual harassment complaints are rare. See *Incidence of Sexual Harassment, supra* at 30.



pursuing matters, they will be on their own." *Secrets in Public, supra* at 15. They "feel very alone and abandoned." *Id.* "Insult is thus added to injury because adults will neither confirm that sexual harassment is taking place nor intervene to stop it." *Id.*

Evidence of school-inflicted harm is most poignantly described by young harassment victims themselves:

"I was in summer school on the last day, I was wearing a silk black tank top and jeans (very baggy). Three guys cornered me and said, 'You know if we raped you right now we could get away with it because you're dressed like a slut.' That alone made me feel so ashamed and embarrassed because I thought I looked nice, to have someone say you look like a slut just crushes your feelings. As if that weren't enough when I yelled out to my teacher she said, 'You know you ask for it - you get what you deserve,' and she wouldn't help me. She always, in my opinion, favored the guys. I talked to two other girls in the class and similar things happened to them, and our teacher seemed to think it was our fault." [17-year-old, Maryland.]

*Id.*, sec. (Whom Did They Tell?).

"I have told teachers about this a number of times; each time nothing was done about it. Teachers would act as if I had done something to cause it. Once I told a guidance counselor, but was made to feel like a whore when she asked questions like 'Do you like it?' and 'They must be doing it for a reason. What did you do to make them do it?' " [13-year-old, Pennsylvania.]

*Id.*

"One thing I learned was how unfair the world can be. I took a photography class and the majority of the class was boys. . . . I was in the darkroom developing pictures and they would come in and corner me. They would touch me, put their hands on my thighs and slide their hands up my skirt. They often tried to put my hand down their pants. . . . One day I was in the room alone and one of the boys came in. When I went to leave he grabbed me and threw me down and grabbed my breast. I felt I was helpless, but I punched him and he ran out. The teacher (who was a man) came in and yelled at me. When I tried to explain why I had hit him the teacher told me I deserved it because I wore short skirts. I was sent to the principal and I had to serve detention. I didn't tell the principal because I feared he would do the same and tell me it was my fault. I felt so alone." [15-year-old, New Jersey.]

*Id.*

"I feel that school administration needs to view this as a serious problem. In my particular case, I was receiving comments pertaining to sexual parts of my body, and being asked to respond to sexually explicit jokes. This went on for over 6 months. I was fed up. After reporting this *three* times to the school administration, I was told that these boys were 'flirting' and had a 'crush' on me. I was disgusted with the actions of the administration. They told me they would give the boys a strict warning. I saw them do it. I don't think asking someone to stop harassing another person is a strict warning. The worst part of the whole thing is that they gave them the same 'warning' on three different occasions.

The harassing never stopped and I was humiliated; I'm scared. If you can't feel comfortable at school, how can you get a good education? Something has got to change." [14-year-old, Illinois.]

*Id.*

"In my case there were 2 or 3 boys touching me, and trust me they were big boys. And I'd tell them to stop but they wouldn't! This went on for about 6 months. Finally I was in one of my classes when all of them came back and backed me into a corner and started touching me all over. So I went running out of the room and the teacher yelled at me and I had to stay in my seat for the rest of the class. But after the class I told the principal, and him and the boys had a little talk. And after the talk was up, the boys came out laughing cause they got no punishment." [12-year-old, Michigan.]

*Id.*

"I'd like to see the school and the administration take a much stronger approach to stopping this problem. Teachers are around when the boys do these things but they just chalk it up to boys being boys, with little feeling to how it's making the females feel." [17-year-old, Massachusetts.]

*Id.*, sec. (What Do Students Think Schools Should Do?).

"I think schools need to pay more attention to what's going on around them because girls like me are just dying inside because no one will believe us." [14-year-old, Florida.]

*Id.*

When schools consistently ignore or refuse to remedy ongoing sexual harassment of students by their peers, they foster a discriminatory environment, and send a message to the victims that such harassment is normal. As one young survey respondent put it:

"Of the times I was sexually harassed at school, one of them made me feel really bad. I was in class and the teacher was looking right at me when this guy grabbed my butt. The teacher saw it happen. I slapped the guy and told him not to do that. My teacher didn't say anything and looked away and went on with the lesson like nothing out of the ordinary had happened. It really confused me because I knew guys weren't supposed to do that, but the teacher didn't do anything. I felt like the teacher (who was a man) betrayed me and thought I was making a big deal out of nothing. But most of all, I felt really bad about myself because it made me feel slutty and cheap. It made me feel mad too because we shouldn't have to put up with that stuff, but no one will do anything to stop it. Now sexual harassment doesn't bother me as much because it happens so much it almost seems normal. I know that sounds awful, but the longer it goes on without anyone doing anything, the more I think of it as just one of those things that I have to put up with." [14-year-old girl from a large city in Washington state.]

*Incidence of Sexual Harassment, supra* at 10.

According to the Eleventh Circuit's opinion in the present case, however, all the foregoing conduct by school officials would fall outside Title IX's mandate to eliminate all forms of sex discrimination, for the sole



reason that the harasser was a student and not a teacher. Such categorical exclusion of one type of discrimination from Title IX cannot be squared with the statute's plain language or our national commitment to eliminating sex discrimination.

**III. WHEN SCHOOLS TOLERATE, CONDONE, OR REFUSE TO REMEDY PEER SEXUAL HARASSMENT, THEY TEACH STUDENTS THAT SEXUAL HARASSMENT IS ACCEPTABLE, A LESSON THAT STUDENTS ARE APT TO TAKE WITH THEM INTO THE WORKING WORLD.**

Left unchecked, the same harassing behavior perpetrated in elementary and high school can continue in the higher education context, and may ultimately resurface in the workplace. Students who learn it is acceptable to harass their peers in school will be ill-prepared for the working world. It is well-established that employers' failure to take reasonable steps to prevent co-worker harassment results in Title VII liability. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1000-01, 1003 (1998). As this Court has recognized, "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Harris*, 510 U.S. at 21 (citations and internal quotation marks omitted). Title VII has been found to have been violated, for example, where, in a situation analogous to this one, a colleague engages in lewd, sexually explicit commentary and assaults his female peers and the employer fails to respond. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d

1469, 1482-86 (3d Cir. 1990); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1514-15 (9th Cir. 1989); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013-15 (8th Cir. 1988); *Henson v. City of Dundee*, 682 F.2d 897, 901-05 (11th Cir. 1982); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 885 (D. Minn. 1993).

The school's failure to respond to G.F.'s continual harassment of LaShonda in this case, which interfered with her ability to concentrate, resulted in her grades dropping, and even compelled her to compose a suicide note (see Pet. App. at 97a), would have unquestionably constituted actionable harassment had it occurred in a workplace setting. Just as sexually harassing conduct that is sufficiently severe or pervasive can create a hostile work environment under Title VII, it can cultivate a hostile learning environment under Title IX. See *Doe v. University of Illinois*, 138 F.3d 653, 678 (7th Cir. 1998) (Easterbrook, J., concurring) ("[F]ailure to protect pupils from private aggression is a species of discrimination. This is the original meaning of equal protection of the laws."), *petition for cert. filed*, 67 U.S.L.W. 3126 (U.S. Aug. 18, 1998) (No. 98-126).

As this case demonstrates, peer harassment often begins long before students arrive at college or enter the workforce: it occurs as early as elementary school. See Jean O'Gorman Hughes & Bernice Resnick Sandler, *Peer Harassment: Hassles for Women on Campus* 7 (Center for Women Policy Studies 1988) [hereinafter *Peer Harassment*]. As Connecticut's Permanent Commission on the Status of Women concluded, "[a]s long as sexual harassment is treated casually – or ignored – in schools, the underlying message students receive is that harassment is approved or tacitly condoned." *In Our Own Backyard*, *supra* at 32. Since peer harassment in schools frequently

occurs in public classrooms and hallways where peers and school officials are likely to witness it (see *Hostile Hallways*, *supra* at 12-13 (66% of harassed students were harassed by peers in the hallways of their schools; 55% were harassed by their peers in classrooms)), student bystanders are apt to learn this as well. "When these behaviors occur again and again, and when they are unnoticed or condoned by peers and even some [school] officials, [boys] and [girls] alike receive the message that women can be treated with disdain, a lack of respect, and that [it] does not matter to anyone." Bernice Resnick Sandler, *Student-To-Student Sexual Harassment*, in *Sexual Harassment on Campus: A Guide for Administrators, Faculty and Students* 51 (Bernice R. Sandler & Robert J. Shoop eds., 1997) [hereinafter *Student-To-Student Sexual Harassment*].

Having learned that sexual harassment of their peers is acceptable, students are likely to carry this message with them from one phase of their lives to the next. According to the AAUW nationwide study of peer harassment in high schools, *Hostile Hallways*, 41% of high school boys who harassed their classmates reported engaging in harassment because "[i]t's just a part of school life/a lot of people do it/it's no big deal." *Hostile Hallways*, *supra* at 12. One fourteen-year-old male noted: "People do this stuff [sexual harassment] every day. No one feels insulted by it. That's stupid. We just play around. I think sexual harassment is normal." *Id.* at 24 (emphasis added). What is learned as "normal" behavior in high school is apt to be repeated in college. Echoing the high school student's views above, for example, a group of male college students called into the Dean's

office for cornering a female student and grabbing her genitals responded: "'but everybody does this in high school.'" *Student-To-Student Sexual Harassment*, *supra* at 51.

The lesson that sexual harassment is permitted can extend into the professional training environment as well. Earlier this year, for example, six members of the Harvard Business School graduating class (average age: 27; average years of prior work experience: 4) were disciplined for harassing their first-year female classmates by, among other things, passing lewd, sexually explicit notes to them during class, in which they proposed things like the following: "'You look delicious presenting your shareholder argument. Come over here so I can lick you!'" Jerry Useem, *Harvard Business School's "Woman Problem," Inc. Magazine*, June 1998, at 33. The graduate students' comments vary little from those made by elementary school student G.F. to his classmate LaShonda in this case: "I want to get in bed with you" and "I want to feel your boobs." (See Pet. App. at 95a.) As these two scenarios from vastly different educational levels demonstrate, "[w]hen men harass women with impunity, they are learning that women are fair game and that such harassment is acceptable behavior." *Student-To-Student Sexual Harassment*, *supra* at 57. Moreover, men who harass in college are likely to continue the behavior in the workplace where it is less likely to be tolerated and can be a cause for dismissal and/or a lawsuit. See *id.*

As this Court recognized over forty years ago, "education is perhaps the most important function of state and local governments" in our modern society. *Brown v. Board of Educ.*, 347 U.S. at 493. "[R]equired in the performance



of our most basic public responsibilities" and integral to the operation of "our democratic society," education "is the very foundation of good citizenship. . . . [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.*; see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.").<sup>3</sup> Given "the unique mission and setting of an educational institution," schools have a duty to take appropriate action to prevent peer harassment:

"In addition to the curriculum, students learn about many different aspects of human life and interaction from school. The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students."

*Doe v. Petaluma City Sch. Dist.*, 949 F. Supp. 1415, 1427 (N.D. Cal. 1996) (quoting Department of Education, Racial Incidents and Harassment Against Students at

---

<sup>3</sup> Formal education thus provides "more than an intellectual experience; it has an important social component. . . . At best, [schools] can provide the opportunity to further the social growth of students, with [students] learning how to get along with peers and how to handle differences of race, ethnicity and gender. This 'social learning' has been labeled 'co-curricular,' indicating that it is equal in value to the intellectual learning that takes place on campus." *Peer Harassment*, *supra* at 1.

Educational Institutions, Investigative Guidance, 59 Fed. Reg. 11,448, 11,449 (1994)).

By failing to teach G.F. and students like him that discriminatory behavior such as sexual harassment is unacceptable, educational institutions like the Respondent abandon a principal component of their educational mission: "preparing [students] for later professional training, and . . . helping [them] to adjust normally to [their] environment." *Brown v. Board of Educ.*, 347 U.S. at 493. By failing to respond to students' complaints about another student's harassing conduct, schools refuse to protect students from discriminatory practices as required by Title IX. See *Gebser*, 118 S. Ct. at 1997; *Cannon v. University of Chicago*, 441 U.S. 677, 703-04 (1979).

**CONCLUSION**

For the foregoing reasons, *amici* urge that the decision of the Eleventh Circuit Court of Appeals be reversed.

Respectfully Submitted,

HORVITZ & LEVY LLP

DAVID S. ETTINGER

LISA R. JASKOL

MARY-CHRISTINE SUNGAILA\*

\* *Counsel of Record*

15760 Ventura Boulevard, 18th Floor  
Encino, California 91436-3000  
(818) 995-0800

**NOW LEGAL DEFENSE AND  
EDUCATION FUND**

MARTHA F. DAVIS

JULIE GOLDSCHIED

YOLANDA S. WU

99 Hudson Street, 12th Floor  
New York, New York 10013-2871  
(212) 925-6635

November, 1998

*Counsel for Amici Curiae*

**APPENDIX**



## APPENDIX

STATEMENTS OF INTEREST OF *AMICI CURIAE*

## NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is eliminating barriers that deny women and girls equal opportunity, such as sexual harassment. For years, NOW LDEF has fought for educational equity for girls. In April 1993, NOW LDEF and the Wellesley College Center for Research on Women released the results of a survey on sexual harassment in schools that they conducted through *Seventeen* magazine. NOW LDEF was co-counsel in *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993), *reconsid. granted*, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case in which a court recognized that schools' failures to respond to peer sexual harassment may violate Title IX. NOW LDEF has appeared as *amicus* in numerous cases concerning girls' rights to be free from sexual harassment and sex discrimination in the schools, including *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998) and *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), and many appellate court decisions concerning schools' liability under Title IX for sexual harassment of students.

### **American Association of University Women**

For well over a century, the American Association of University Women (AAUW), an organization of 150,000 members, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls. AAUW plays a major role in activating advocates nationwide on AAUW's priority issues. Current priorities include gender equity in education, reproductive choice, and workplace and civil rights issues. AAUW believes that Title IX is essential for continuing the advancement of women and girls in education.

### **American Jewish Congress Commission for Women's Equality**

The American Jewish Congress Commission for Women's Equality is an activist leadership group of Jewish women which seeks to pursue equal rights for women within a Jewish context. As an arm of the American Jewish Congress, it has filed numerous briefs in the Supreme Court concerning abortion and reproductive rights and sexual discrimination and harassment. It believes that women, particularly young women in a school setting, cannot reach their full potential if they are sexually harassed by their fellow students. It further believes that Title IX of the Education Amendments of 1972 requires school authorities to protect students against peer harassment.

### **California Women's Law Center**

The California Women's Law Center (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The CWLC was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: sex discrimination, including sex discrimination in education, women's health and reproductive rights, family law, violence against women and child care. Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women and girls in education, particularly the issues of discrimination because of sexual harassment. The issues raised in this case will have an enormous impact on the rights of girls to receive an education free of the terrible consequences of harassment.

### **Center for Advancement of Public Policy**

Center for Advancement of Public Policy is a non-partisan, non-profit organization founded in 1991. Its mission includes national outreach on issues of importance to women and girls, including education and sexual harassment. The Center is a member of the National Coalition for Women and Girls in Education. The Center's research program includes sponsored research in educational equity for girls, with emphasis on girls of color and those with disabilities.

### **Center for Women Policy Studies**

The Center for Women Policy Studies is a national nonprofit, multiethnic and multicultural feminist policy



research and advocacy institution. The Center has been a leader in research, policy analysis and advocacy on violence against women since its founding in 1972. In 1993, the Center began an examination of girls' experiences with violence. To bring the voices of girls and teenage women into the public policy debate about youth violence, the Center conducted focus group research and a national survey of readers of two girl-focused magazines. Based on its research, the Center believes that girls who have been sexually harassed and/or abused are more likely to perceive violence as acceptable behavior. Thus, the Center advocates for programs that immediately intervene when girls are victimized to not only stop the abuse but also to connect girls to services that will help them cope appropriately and positively to the victimization.

#### **Connecticut Women's Education and Legal Fund, Inc.**

The Connecticut Women's Education and Legal Fund, Inc. (CWEALF), is a non-profit women's rights organization. Incorporated in 1973, CWEALF has over 1,400 members. The mission of the organization is to work through legal and public policy strategies and community education to end sex discrimination in the state's education, judicial, social service, and employment systems. For nearly 25 years, CWEALF has been a leader in Connecticut in working on the issue of sexual harassment. CWEALF provides legal information and referrals to women on a daily basis who face sexual harassment in the workplace; it conducts trainings on sexual harassment prevention to managers and workers, students and

teachers; and it writes *amicus curiae* briefs and provides technical assistance to policy makers in order to improve laws dealing with sexual harassment.

#### **Equal Rights Advocates**

Equal Rights Advocates (ERA) is a San Francisco-based human and civil rights organization dedicated to achieving equality for women and girls. Begun in 1974 as a teaching law firm specializing in issues of sex-based discrimination, ERA has evolved into a legal organization with a multifaceted approach to addressing women's issues. ERA has represented plaintiffs in numerous sexual harassment cases, including the first case in the Ninth Circuit to find sexual harassment a violation of Title VII. *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). In addition, ERA sponsors public policy initiatives, counsels hundreds of individual women each year on their legal right to be free from sexual harassment, and conducts sexual harassment workshops for schools and non-profit organizations. It was co-counsel in *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993), *reconsidered*, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case to recognize a cause of action for peer sexual harassment under Title IX.

#### **Feminist Majority Foundation**

The Feminist Majority Foundation (Foundation) is a non-profit organization with offices in Arlington, Virginia and Los Angeles, California. The Foundation is dedicated to eliminating sex discrimination, promoting equality and women's rights, and ending violence against women.

Among its equality projects, the Foundation publishes reports and leads programs in the areas of Empowering Women in Business, Medicine, Philanthropy, and Sports. The Foundation runs a sexual harassment hotline and features a "911 for Women" section on its internet site to provide direct information to women and girls on sexual harassment, sexual assault, and domestic violence. Its Feminist Majority Leadership Alliances project is devoted to training young women and girls to assume leadership roles and eliminating sex discrimination.

#### **Lambda Legal Defense and Education Fund**

Lambda Legal Defense and Education Fund (Lambda) is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men and people with HIV/AIDS, through impact litigation, education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization dedicated to those goals. Lambda is interested in the issues raised by this case because lesbian, gay, and HIV-infected students have themselves been the targets of peer harassment in public schools, and many of those instances of harassment have involved sex discrimination. Lambda, for example, was counsel in *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), a successful challenge on behalf of a young gay student to a denial of equal protection (based on the student's sex and sexual orientation) in the school's response to peer harassment. Such enforcement of the Constitution is an integral component of the broad-based effort of many groups to ensure safe schools for all

students. Title IX's statutory protection against sex discrimination is another integral part of that same effort and should be given full effect here.

#### **Ms. Foundation for Women**

The Ms. Foundation for Women, the country's only national, multi-issue women's fund, has been developing opportunities for women for more than 25 years. Creator of the award-winning *Take Our Daughters To Work® Day*, the Ms. Foundation is dedicated to improving the lives of women and girls in the areas of Economic Security, Health and Safety, & Girls, Young Women and Leadership. With headquarters in New York, the Ms. Foundation makes grants, conducts advocacy and public-education campaigns, and provides training and technical assistance to non-profit organizations throughout the United States. The Ms. Foundation is dedicated to ensuring the girls are permitted to reach their full potential in a positive, safe environment. School-based sexual harassment is completely anathema to this goal.

#### **Myra Sadker Advocates for Gender Equity**

Founded in 1995 as an ongoing legacy to Myra Sadker's pioneering work in gender equity, Myra Sadker Advocates promote gender equity in and beyond schools. By working to eliminate gender bias, the Advocates enhance the academic, psychological, economic and physical potential of America's children. Almost 1,000 national advocates enhance the lives of thousands more as they address equity issues in research that explores the social and institutional dynamics of sexism, training that



promotes non-biased and effective treatment of girls and boys, and outreach that supports a wide spectrum of work in gender equity beyond schools. Research studies show that the primary step in creating effective schools is the establishment of a safe school climate. Indeed, student safety is a necessary prerequisite for learning. Without this fundamental right, education itself is endangered. Myra Sadker Advocates join this brief to recognize peer sexual harassment as a cause of action under Title IX, thus insuring that school districts create safe and productive learning climates.

#### **National Alliance of Sexual Assault Coalitions**

Organized in September of 1995, the National Alliance of Sexual Assault Coalitions (NASAC) is a national organization focusing on public policy and public education to end sexual violence. NASAC has developed a comprehensive grassroots communications network of state coalitions from across the United States who have extensive state public policy experience. As such, NASAC effectively advocates for the needs, rights and concerns of victims of sexual assault.

#### **National Association for Girls and Women in Sport**

For almost 100 years, the National Association for Girls and Women in Sport (NAGWS) has promoted equal opportunities for girls and women in education and athletics. NAGWS champions equal opportunities, high quality and respect for girls' and women's sport programs. NAGWS is a not-for-profit, educational organization whose 5,000 members are professional educators:

administrators, teachers, and coaches at all levels of education. Its national membership is concerned with *Davis v. Monroe County Board of Education* because the ramifications of Title IX decisions affect the world of academia as well as the arena of athletics. A level playing field cannot be created for women in sports or society if the school systems in which our children are taught do not provide a safe and fair environment for learning. Schools must be held accountable for the actions of students and employees during school hours and school functions. Without a means to enforce legal restitution in sexual harassment cases which overwhelmingly victimize females, girls and women will remain silenced by our society.

#### **National Coalition for Sex Equity in Education**

The National Coalition for Sex Equity in Education (NCSEE) was founded in 1979 to provide training opportunities and a support network for gender equity specialists in regional, state, and local education programs, funded under Title IV of the Civil Rights Act. Today, more than 600 NCSEE members represent a wide range of professional educators, including teachers, counselors, and administrators as well as equity specialists, Title IX coordinators, and vocational education equity coordinators. NCSEE provides leadership in identifying and infusing gender equity in all educational programs and processes, within parallel equity concerns of race, national origin, disability, age, religion, and sexual orientation. NCSEE members have accomplished pioneering work in peer sexual harassment in schools through their

research, writings and publications, as well as by developing and implementing relevant, effective and cutting-edge training programs. NCSEE members have also developed approaches to assist administrators and faculty with policy, procedures and appropriate intervention strategies to prevent peer sexual harassment behaviors that contribute to a hostile learning and teaching environment. NCSEE members are convinced that, if sexual harassment is to be successfully eliminated, it must be considered a form of sex discrimination actionable under Title IX of the Education Amendments of 1972.

#### **National Organization for Women Foundation**

The National Organization for Women Foundation is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with a membership of over 250,000 women and men in more than 600 chapters in all 50 states and the District of Columbia. Since its inception in 1986, a major goal of NOW Foundation has been to ensure equality and fair treatment for girls and women, particularly including freedom from sexual harassment in schools and on the job. We have a strong interest in the proper application and enforcement of Title IX to prevent peer sexual harassment.

#### **National Women's History Project**

The National Women's History Project (NWHP) was founded in 1980 to increase public recognition of women's historic contributions and accomplishments.

The NWHP initiated and continues to promote the March celebration of Women's History Month nationwide, coordinates the Women's History Network of activists across America, works with textbook publishers to increase women's representation in school materials, and facilitates community and workplace programmers' efforts to introduce women's history to out-of-school audiences. Tens of thousands of people are impacted annually by these efforts.

#### **Northwest Women's Law Center**

The Northwest Women's Law Center (NWLC) is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Founded in 1978, the NWLC has been, *inter alia*, dedicated to challenging barriers to sexual equality in education with a focus on eradicating gender discrimination through the enforcement of Title IX. Toward that end, the NWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest, and the country, to ensure that women and girls at all educational levels have equal access to educational opportunities. The NWLC was lead counsel in *Blaire v. Washington State Univ.*, 108 Wn. 2d 558 (1987), a case that set important precedent requiring state universities to provide equal funding and scholarship opportunities for women's athletic programs. The NWLC is currently litigating several Title IX cases throughout the region that seek to ensure that girls receive equal educational opportunities in harassment-free atmospheres. The NWLC is also working directly with numerous school districts and



parent groups to monitor and enforce compliance with the mandates of Title IX. The NWLC continues to serve as a regional expert and leading advocate on Title IX and sexual harassment.

#### **Survivors of Educator Sexual Abuse and Misconduct Emerge, Inc.**

Survivors of Educator Sexual Abuse and Misconduct Emerge (S.E.S.A.M.E. Inc.) is a non-profit organization that began as a grassroots effort. S.E.S.A.M.E. Inc. is the only organization that identifies and supports individuals who were victims of sexual abuse and harassment by educators. The founder and current president were themselves individuals and family members of those who have been abused by an educator. S.E.S.A.M.E. Inc. is known nationally and internationally; its membership has grown to 700 since 1994. Both the founder and president have donated their time and energies to educating school administrators, legislators, law enforcement's mental health professionals, colleges and universities, student teachers, and junior and high school students about the devastating effects of educator sexual abuse. S.E.S.A.M.E. Inc. was formed to support victims through outreach, education, legislation, web site, and numerous media appearances to educate the public on this specific type of abuse.

#### **Texas Civil Rights Project**

The Texas Civil Rights Project is a statewide civil rights litigation and education project. In operation since 1990, the Project seeks to promote social and economic

justice. Since Fall 1993, the Texas Civil Rights Project has devoted significant resources towards Title IX litigation and education. The Project operates Stop Harassment in Public Schools (SHIPS), the nation's only full-time sexual harassment prevention project. SHIPS provides community training, conducts education research, and publishes resources on sexual harassment prevention and curriculum.

#### **Title IX Advocacy Project**

The Title IX Advocacy Project (Project) is a youth empowerment and legal/educational advocacy organization that works with young people and their adult allies to stop gender discrimination in middle schools and high schools in the greater Boston area. The Project was founded in September 1994 and currently focuses on eliminating 1) sexual harassment in school, 2) discrimination against pregnant and parenting students, and 3) gender inequity in school-based sports programs. The Project facilitates sexual harassment workshops at schools, community centers, and conferences, sponsors peer education programs, facilitates rap sessions and discussion groups with young people, provides education and assistance to young people and their families, develops age-appropriate and culturally sensitive sexual harassment policies for schools, and creates and disseminates resource materials.

#### **Title IX Advocates**

Title IX Advocates is an offshoot of Parents for Title IX, a grassroots civil rights organization started in 1992.

Title IX Advocates was started with the aim of broadening appeal to more than parents, and to establish a common base of information about Title IX and gender equity in education issues, on list serves dedicated to gender equity, such as the Feminist Jurisprudence list and the Edequity list of WEEA. Title IX Advocates provides letters of support and interest to parents and other community members around the country. It is especially interested in the application of Title IX to peer sexual harassment cases, because such harassment is one of the chief mechanisms by which girls and women are disadvantaged in education.

#### **The United States Student Association**

Founded in 1947, the United States Student Association is the nation's oldest and largest student association representing over 350 campuses and 3 million students around the country. Its mission is to increase access to education for all students regardless of race, class, gender, sexual orientation, or religion. For girls and women, sexual harassment not only restricts access to education but also involvement in education. USSA has long practiced a no-tolerance policy towards sexual harassment within its organization, in its office, at its conferences and within its membership. This policy has proved to provide a more equitable environment for all of those participating in our organization. USSA has always and will continue to fight sexual harassment and fight to tighten sexual harassment policies on campus as well as at the federal level.

#### **Women & Philanthropy**

Women & Philanthropy (W&P) is a national association of grantmakers who are interested in achieving equity for women and girls. Founded in 1977, Women & Philanthropy works to achieve its mission by encouraging the use of a gender lens approach to grantmaking decisions, and by working to get more women and people of color who support gender equity into leadership positions in organized philanthropy. Our 500 individual and institutional members include trustees, CEO's, and program officers from private, corporate, and family foundations across the country, as well as individual donors. W&P supports the Petitioner's position in *Davis v. Monroe County Board of Education* because sexual harassment, including peer sexual harassment, is a barrier to gender equity in education. W&P believes that in order to achieve equal opportunities in education, girls must remain free from sexual harassment in the school setting, including from harassment by peers.

#### **Women Employed**

Women Employed is a national organization of working women, based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, analyzed equal opportunity policies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that one of the most fundamental guarantees that women and girls are entitled to



under Title IX is an equal educational opportunity free from sexual harassment.

#### **Women Lawyers Association of Los Angeles**

Women Lawyers Association of Los Angeles (WLALA) is a nonprofit organization comprised primarily of attorneys and judges in Los Angeles County. Founded in 1919, WLALA is dedicated to promoting the full participation of women lawyers and judges in the legal profession, maintaining the integrity of our legal system by advocating principles of fairness and equality, and improving the status of women in our society including their exercise of equal rights and reproductive choice. To further these goals, WLALA files *amicus* briefs in cases that may have a significant impact on women's rights. WLALA is supporting the Petitioner in this case because it believes that in order for women to achieve equality in our society, they must have equal educational opportunities, including the opportunity to attend schools that are free of sexual harassment.

#### **The Women's Law Center of Maryland, Inc.**

The Women's Law Center of Maryland, Inc. advocates for the legal rights of women and children in Maryland. The organization was founded in 1971 to meet the special legal needs of women, especially in the areas of sex discrimination in employment and education and family law. The Women's Law Center of Maryland, Inc. has appeared as *amicus* in many cases concerning sex-based discrimination, both locally and nationally. It hosts an annual event to raise the self-esteem of girls and

promote awareness of legal processes to end sex discrimination. The Women's Law Center of Maryland, Inc. believes the issues raised in *Davis v. Monroe County Board of Education* are critical to the rights of girls to be free from sexual harassment and sex discrimination in schools.

#### **Women's Law Project**

The Women's Law Project (WLP) is a non-profit public interest legal center located in Philadelphia, PA. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. The WLP is committed to ending sexual abuse and harassment of women and children and to safeguarding the legal rights of women and children who experience sexual abuse. Toward that end, the WLP is interested in insuring a proper remedy for students who are subject to sexual harassment.

---

(11)

Supreme Court, U. S.

F I L E D

DEC 8 1998

CLERK

No. 97-843

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1998

AURELIA DAVIS, as next friend of LASHONDA D.,

*Petitioner,*

vs.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

**BRIEF OF *AMICI CURIAE* STUDENTS FOR INDIVIDUAL  
LIBERTY AND STUDENT ASSOCIATION FOR FREEDOM  
OF EXPRESSION IN SUPPORT OF RESPONDENTS**

JAMES A. MOODY

*Attorney for Amici Curiae*

1101 30th Street, N.W.

Suite 300

Washington, DC 20006

(202) 298-4766

**BEST AVAILABLE COPY**

H2PP



## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	iii
INTEREST OF AMICI CURIAE . . . . .	1
SUMMARY OF ARGUMENT . . . . .	2
ARGUMENT . . . . .	3
I.    APPLYING HOSTILE ENVIRONMENT REGULATIONS TO STUDENT SPEECH WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS . . . . .	3
A.    The Courts Have Repeatedly Struck Down Hostile-Environment Harassment Codes on First Amendment Grounds . . .	3
B.    The Office for Civil Rights Interprets Title IX to Require Speech Codes, Including Restrictions on Core Political Speech . . . . .	6
C.    Hostile Environment Regulations Have Frequently Been Used to Silence Dissent on College Campuses. . . . .	11
D.    Applying Hostile Environment Regulations to College Campuses Under Title IX Would Require Broad Restrictions on Core Political Speech . .	15
II.    THIS COURT SHOULD CONSTRUE TITLE IX NARROWLY TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS.	22

III. SERIOUS CONSTITUTIONAL QUESTIONS CAN BE AVOIDED BY CONSTRUING TITLE IX AS MODELLED ON THE EQUAL PROTECTION CLAUSE, WHICH DOES NOT REACH STUDENT SPEECH OR CONDUCT . . . . .	23
CONCLUSION . . . . .	30

## TABLE OF AUTHORITIES

### CASES

<i>American Booksellers Ass'n v. Hudnut</i> , 771 F.2d 323 (7th Cir. 1985), <i>aff'd</i> , 475 U.S. 1001 (1986) . . . . .	19
<i>Blum v. Yaretsky</i> , 457 U.S. 991 (1982) . . . . .	25
<i>Brown Transport Corp. v. Pennsylvania Human Relations Commission</i> , 578 A.2d 555 (Pa. Commw. 1990) . . . . .	16
<i>Brzonkala v. Virginia Polytechnic Insti- tute</i> , 132 F.3d 949 (4th Cir. 1997), <i>reh'g en banc granted, opinion vacated</i> , Feb. 5, 1998 . . . . .	25
<i>Burton v. Wilmington Parking Authority</i> , 365 U.S. 715 (1962) . . . . .	25
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979) . . . . .	24
<i>Cardin v. Via Tropical Fruits</i> , 1993 U.S. Dist. LEXIS 16302 (S.D. Fla. July 9, 1993) . . . . .	20
<i>Chevron v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984) . . . . .	22
<i>Cohen v. San Bernardino Valley College</i> , 92 F.3d 968 (9th Cir. 1996) . . . . .	28



<i>Collins v. Smith</i> , 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978) . . . . .	20, 29
<i>Corry v. The Leland Stanford Junior University</i> , Case No. 740309 (Cal. Super. Ct., San Clara Cty.) . . . . .	10
<i>Dambrot v. Central Michigan University</i> , 55 F.3d 1177 (6th Cir. 1995) . . . . .	3, 4
<i>Davis v. Monroe County Board of Education</i> , 120 F.3d 1390 (11th Cir. 1997), cert. granted in part, 119 S.Ct. 29 (1997). . . . .	26
<i>DeAngelis v. El Paso Mun. Police Officers Ass'n</i> , 51 F.3d 591 (5th Cir.), cert. denied, 516 U.S. 974 (1995) . . . . .	16
<i>Doe v. Londonderry School District</i> , 970 F. Supp. 64 (D. N.H. 1997) . . . . .	26
<i>Doe v. Taylor Independent School Dist.</i> , 975 F.2d 137 (5th Cir. 1992), cert. denied, 506 U.S. 1087 (1993) . . . . .	28
<i>Doe v. University of Illinois</i> , 138 F.3d 653 (7th Cir. 1997) . . . . .	25
<i>Doe v. University of Michigan</i> , 721 F.Supp. 852 (E.D. Mich. 1989) . . . . .	4
<i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council</i> , 485 U.S. 568 (1988) . . . . .	22

<i>Faragher v. City of Boca Raton</i> , 118 S.Ct. 2275 (1998) . . . . .	24
<i>Gebser v. Lago Vista Independent School District</i> , 118 S.Ct. 1989 (1998) . . . . .	23, 28
<i>Haney v. University of Illinois</i> , 1994 WL 880339 (Ill. Hum. Rts. Comm.) . . .	23
<i>Healy v. James</i> , 408 U.S. 169 (1971) . . . . .	19
<i>Hopwood v. State of Texas</i> , 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996) . . . . .	8
<i>Iota Xi Chapter of Sigma Chi Fraternity</i> , 993 F.2d 386 (4th Cir. 1993) . . . . .	4
<i>Joseph v. Publix Supermarkets, Inc.</i> , 983 F. Supp. 1431 (S.D. Fla. 1997) . . . .	16, 20
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967) . . . . .	28
<i>Louisiana Debating and Literary Association v. New Orleans</i> , 42 F.3d 1483 (5th Cir. 1995) . . . . .	21
<i>Lugar v. Edmondson Oil Co.</i> , 457 U.S. 922 (1982) . . . . .	29
<i>Monteiro v. Tempe Union High Sch. Dist.</i> , 158 F.3d 1022 (9th Cir. 1998) . . . . .	15, 23

<i>Moose Lodge No. 107 v. Irvis</i> , 407 U.S. 163 (1972) . . . . .	26
<i>N.L.R.B. v. Catholic Bishop of Chicago</i> , 440 U.S. 490 (1979) . . . . .	22
<i>NAACP v. Button</i> , 371 U.S. 415 (1963) . . . . .	19
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) . . . . .	9
<i>Oncale v. Sundowner Offshore Services</i> , 118 S.Ct. 998 (1998) . . . . .	24
<i>Personnel Administrator v. Feeney</i> , 442 U.S. 256 (1979) . . . . .	26
<i>Podberesky v. Kirwan</i> , 838 F. Supp. 1075 (D. Md. 1993), <i>rev'd on other</i> <i>grounds</i> , 38 F.3d 147 (4th Cir. 1994), <i>cert. denied</i> , 514 U.S. 1128 (1995) . . . . .	16
<i>R.A.V. v. St. Paul</i> , 505 U.S. 377 (1992) . . . . .	19
<i>Regents of the University of California v.</i> <i>Bakke</i> , 438 U.S. 265 (1978) . . . . .	24, 28
<i>Richardson v. CHI Institute, No.</i> 96-CV-7524 (E.D. Pa. Jan. 14, 1998) . . . . .	18
<i>Rosenberger v. Rector &amp; Visitors of the</i> <i>University of Virginia</i> , 515 U.S. 819 (1995) . . . . .	19

<i>San Francisco Arts &amp; Athletics, Inc. v.</i> <i>United States Olympic Committee</i> , 483 U.S. 522 (1987) . . . . .	25
<i>Schwapp v. Avon</i> , 118 F.3d 106 (2d Cir. 1997) . . . . .	17
<i>Silva v. Univ. of New Hampshire</i> , 888 F. Supp. 293 (D.N.H. 1994) . . . . .	28
<i>Sparks v. Pilot Freight Carriers, Inc.</i> , 830 F.2d 1554 (11th Cir. 1987) . . . . .	21
<i>The Civil Rights Cases</i> , 109 U.S. 3 (1883) . . . . .	25
<i>Thonen v. Jenkins</i> , 491 F.2d 722 (4th Cir. 1973) . . . . .	19
<i>United States v. Fordice</i> , 505 U.S. 717 (1992) . . . . .	24
<i>United Steelworkers v. Weber</i> , 443 U.S. 193 (1979) . . . . .	24
<i>UWM Post, Inc. v. Board of Regents of</i> <i>Univ. of Wisconsin System</i> , 774 F.Supp. 1163 (E.D. Wis. 1991) . . . . .	3, 13, 26
<i>Wilson v. Taylor</i> , 733 F.2d 1539 (11th Cir. 1984) . . . . .	21
<i>Yniguez v. Arizonans for Official English</i> , 69 F.3d 920 (9th Cir. 1995), <i>vacated</i> , <i>Arizonans for Official English v.</i> <i>Arizona</i> , 117 S.Ct. 1055 (1997) . . . . .	29



## CONSTITUTIONS, STATUTES, AND RULES

20 U.S.C. § 1681 . . . . . 2, 7, 8, 10, 22, 23, 27-29

42 U.S.C. § 2000d . . . . . 7, 8, 10, 24

42 U.S.C. § 2000e . . . . . 3, 23, 24

*Racial Incidents and Harassment Against  
Students at Educational Institutions;  
Investigative Guidance*, 59 Fed. Reg.  
11448 (March 10, 1994). . . . . 7

*Sexual Harassment Guidance: Harassment of  
Students By School Employees, Other  
Students, or Third Parties*,  
62 Fed. Reg. 12034 (Mar. 13, 1997) . . . . . 7

U.S. Const. amend. I . . . . . 1-3, 5, 11, 13, 19, 21, 22

U.S. Const. amend. XIV, § 1 . . . . . 2, 26, 28, 29

## MISCELLANEOUS

Baker, *Sexual Misconduct Among Students:  
Title IX Court Decisions in the  
Aftermath of Franklin v. Gwinnett  
County*, 106 Ed. Law Rep. 519 (1996) . . . . . 4

Balmain, *Readers: This Column Might Offend  
You*, *Orange County Register*, Dec. 7,

1994, *Metro* 1 . . . . . 12

*Big Sister Is Watching*,  
*Sacramento Bee*, Sept. 27, 1994, at B6 . . . . . 7

Craddock, *Constitutional Law, 'Words That  
Injure, Laws That Silence:' Campus  
Hate Speech Codes and the Threat to  
American Education*, 22 Fla. St. U. L.  
Rev. 1047 (1995) . . . . . 5, 6

Ek, *College Drops Harassment Ban*,  
*S.F. Chron.*, Dec. 4, 1993, at A18 . . . . . 12

Estlund, *Freedom of Expression in the  
Workplace and the Problem of  
Discriminatory Harassment*,  
75 Tex. L. Rev. 687 (1997) . . . . . 17, 18

Faulkner, *A Rose for Emily* . . . . . 15

Fried, *The New First Amendment  
Jurisprudence: A Threat to Liberty*,  
59 U. Chi. L. Rev. 225 (1992) . . . . . 5

Gates, *Let Them Talk: Why Civil Liberties  
Pose No Threat to Civil Rights*,  
*New Republic* (Sept. 20 & 27, 1993) . . . . . 15

Grey, *How to Write a Speech Code Without  
Really Trying*, 29 U.C. Davis. L. Rev.  
891 (1996) . . . . . 10

Hentoff, *Sexually Harassed by Francisco*  
*Goya*, *Wash. Post*, Dec. 27, 1991, A21 . . . . . 12

Jaffe, <i>Walking the Constitutional Tightrope: Balancing Title VII Hostile Environment Sexual Harassment Claims with Free Speech Defenses</i> , 80 Minn. L. Rev. 979 (1996) . . . . .	16
Karner, <i>Political Speech, Sexual Harassment, and a Captive Workforce</i> , 83 Cal. L. Rev. 637 (1995) . . . . .	16, 18
Kors & Silverglate, <i>The Shadow University</i> (1998) . . . . .	5, 11
Lewin, New York Times News Service, <i>Single Sex-Bytes</i> , Chicago Tribune, Oct. 16, 1994, at 5 . . . . .	7
Lewis, New York Times News Service, <i>Speech Code Fit For Orwell</i> , Dallas Morning News, Nov. 30, 1995, at 35A . . . . .	7, 9
McBride, <i>Guidance for Student Peer Sexual Harassment? Not!</i> , 50 Stan. L. Rev. 523 (1998) . . . . .	18
Moore, <i>Free Speech on College Campuses: Protecting the First Amendment in the Marketplace of Ideas</i> , 96 W. Va. L. Rev. 511 (1993) . . . . .	5
<i>Nevermore for Poe Film, Lawsuit Says</i> , S.F. Examiner, Aug. 30, 1994, at A2 . . . . .	12
People for the American Way, <i>Artistic Freedom Under Attack</i> (1994) . . . . .	12

Robbins, <i>When Two Liberal Values Collide in an Era of Political Correctness: First Amendment Protection as a Check on Speech-Based Title VII Hostile-Environment Claims</i> , 47 Baylor L. Rev. 789 (1995) . . . . .	16
Savage, <i>Forbidden Words on Campus</i> , L.A. Times, Feb. 12, 1991, at A1 . . . . .	13
<i>Schools Liable for Kids' Racial Slurs</i> , Nat'l L.J., Nov. 2, 1998, at A10 . . . . .	15
Smolla, <i>Smolla &amp; Nimmer on Freedom of Speech</i> (1997) . . . . .	5
Taylor, <i>A Clintonite Threat to Free Speech</i> , May 9, 1994, Legal Times, Opinion and Commentary, p.2 . . . . .	8
Twain, <i>Huckleberry Finn</i> . . . . .	15
Volokh, <i>Freedom of Speech in Cyberspace From the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex</i> , 1996 U. Chi. Legal F. 377 (1996) . . . . .	5, 16
Volokh, <i>What Speech Does "Hostile Work Environment" Harassment Law Restrict</i> , 85 Geo. L. J. 627 (1995) . . . . .	16, 18



## INTEREST OF AMICI CURIAE

Students for Individual Liberty ("SIL") was founded in 1987 to promote civil liberties. SIL seeks to educate students about their constitutional rights, bringing prominent lawyers, legal scholars, and other academics to the University of Virginia to lecture. Above all else, SIL opposes censorship. SIL members opposed the student government's 1989 attempt to defund the *Virginia Advocate*, the University of Virginia's only conservative publication, and a speech code proposed by the student government in 1988. In 1990, SIL members opposed another speech code which would have banned speech that created a "hostile environment" for members of "historically-disadvantaged" groups.

The Student Association for Freedom of Expression was founded in 1991 at the Massachusetts Institute of Technology. It publicizes abuses of academic freedom on its websites, assists student groups at other universities in opposing censorship, and sponsored a 1992 referendum at M.I.T. in which students voted for modifications to M.I.T.'s harassment code to protect freedom of speech.

*Amici* have a strong interest in the outcome of this case because the Court's decision will have an impact on thousands of students and student publications whose speech may be deemed to contribute to a "hostile environment" on campus.<sup>1</sup> Petitioner and respondents have consented to the filing of this brief by letters filed with the Clerk of the Court.

---

<sup>1</sup> No party or its counsel authored this brief in whole or in part or made any monetary contribution. *Amici*'s members paid for this brief.

## SUMMARY OF ARGUMENT

Title IX must not be construed to impose on educational institutions the duty to prevent student speech that contributes to a "hostile learning environment." Such an interpretation would raise serious First Amendment questions as applied to college students' speech. Moreover, Title IX can reasonably be interpreted more narrowly to avoid those constitutional questions.

First, Title IX is modelled on the Equal Protection Clause, which regulates only the conduct of the institution and its employees, and does not require it to regulate the conduct of its students or third parties. Thus, it is reasonable to construe Title IX as not holding institutions liable for "peer harassment," regardless of whether the harassment takes the form of speech or conduct.

Second, it is a fundamental canon of statutory interpretation that statutes must be interpreted narrowly to avoid serious constitutional questions. This canon overcomes the competing canon that agency interpretations of statutes are given deference by this Court. Thus, if there are serious constitutional questions over whether student speech that contributes to a hostile environment can be restricted, Title IX must be construed narrowly so as not to reach student speech, even if the Office for Civil Rights advocates a broader interpretation.

Third, restricting student speech that contributes to a "hostile learning environment" raises serious constitutional questions in the higher-education setting. Hostile-environment harassment codes at state colleges and universities have been repeatedly struck down by the lower courts. *E.g.*, *Dambrot v. Central Michigan University*, 55

F.3d 1177 (6th Cir. 1995); *UWM Post, Inc. v. Board of Regents of Univ. of Wisconsin System*, 774 F.Supp. 1163 (E.D. Wis. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

## ARGUMENT

### I. APPLYING HOSTILE ENVIRONMENT REGULATIONS TO STUDENT SPEECH WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS.

#### A. The Courts Have Repeatedly Struck Down Hostile-Environment Harassment Codes on First Amendment Grounds.

In case after case, the lower courts have overturned college "hostile environment" harassment policies as unconstitutional as applied to students. *UWM Post, Inc. v. Board of Regents of Univ. of Wisconsin System*, 774 F.Supp. 1163, 1165 (E.D. Wis. 1991), overturned a harassment policy banning "discriminatory comments" based on "race, sex, religion, color, creed, disability, sexual orientation," etc., that "intentionally . . . [c]reate an intimidating, hostile, or demeaning educational environment." The court rejected the argument that Title VII's restrictions on offensive workplace speech were appropriate for university students: "Title VII is only a statute, it cannot supersede the requirements of the First Amendment." *Id.* at 1177.

Similarly, *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), struck down a racial harassment policy banning any "physical, verbal, or non-verbal behavior that subjects an individual to an intimidating,



hostile or offensive educational, employment, or living environment by . . . (c) demeaning or slurring individuals through . . . written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.'" *Id.* at 1182. The Sixth Circuit found that this harassment policy was unconstitutionally vague, overbroad, and viewpoint-based, noting that its plain language applied to all speech, "regardless of political value," that created a hostile environment. *Id.* at 1183.

Other courts have also confronted speech restrictions designed to prevent the development of "hostile environments." The Fourth Circuit overturned a university's discipline of a fraternity for a skit that allegedly contributed to a "hostile and distracting learning environment" for blacks and women, *Iota Xi Chapter of Sigma Chi Fraternity*, 993 F.2d 386, 388, 390 (4th Cir. 1993), while a trial court overturned the University of Michigan's hostile-environment sexual and racial harassment policies in a challenge by a psychology graduate student who showed he might be disciplined for discussing sex-based differences between men and women. *Doe v. University of Michigan*, 721 F.Supp. 852 (E.D. Mich. 1989).

Legal scholars have agreed that there is enough difference between workplace settings and college campuses that "hostile environment" regulations would unconstitutionally infringe college students' rights if applied to their speech. *E.g.*, Thomas Baker, *Sexual Misconduct Among Students: Title IX Court Decisions in the Aftermath of Franklin v. Gwinnett County*, 106 Ed. Law Rep. 519, 535 (1996) ("On a college campus, moreover, public officials may not discipline a student for verbal harassment

unless the offensive verbiage fits within the 'fighting words' exception"), citing *UWM Post*, *supra*; 2 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech*, § 17.24 at 17-34-35 (1997) ("If the First Amendment permits the government to mandate a 'racism-free' workplace, why shouldn't it permit government to mandate a 'racism-free' campus? . . . [Because] [t]he university, by contrast, should be understood *not* as a special setting such as the workplace, but rather as the sort of 'open marketplace' in which content-based regulation of speech is normally prohibited")(discussing *UWM Post*, *supra*); Jeanne M. C-raddock, *Constitutional Law, "Words That Injure, Laws That Silence: " Campus Hate Speech Codes and the Threat to American Education*, 22 Fla. St. U. L. Rev. 1047, 1049, 1089 (1995); Eugene Volokh, *Freedom of Speech in Cyberspace From the Listeners' Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. Chi. Legal F. 377, 436 (1996); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 247-48 (1992); Melanie A. Moore, *Free Speech on College Campuses: Protecting the First Amendment in the Marketplace of Ideas*, 96 W. Va. L. Rev. 511, 537-38, 547-48 (1993); Alan Kors & Harvey Silverglate, *The Shadow University* 89 (1998) ("authoritative First Amendment case law . . . makes it highly unlikely that Title VII proscriptions of offensive speech would be applied to college and university students under Title IX").

"When Constitutional arguments do not succeed, hate speech code advocates look to Title VII of the Civil Rights Act of 1964 regulating harassment in the workplace. Advocates claim that offensive speech creates a hostile environment for students subject to hate speech. But the university setting is different from the workplace.

Workplace speech is generally limited to what is necessary to get the job done, and restrictions are permitted on speech that gets in the way of the job. University education, on the other hand, requires that students confront and engage in speech that is often offensive and disagreeable. The heart of undergraduate and graduate education takes place in wide open debate." Jeanne M. Craddock, *Constitutional Law, "Words That Injure, Laws That Silence: "Campus Hate Speech Codes and the Threat to American Education*, 22 Fla. St. U. L. Rev. 1047, 1049 (1995).<sup>2</sup>

**B. The Office for Civil Rights Interprets Title IX to Require Speech Codes, Including Restrictions on Core Political Speech.**

The Office for Civil Rights has interpreted its

---

<sup>2</sup> The First Amendment may also limit high-school harassment rules. While this Court has given public high schools the *freedom* to restrict patently offensive speech, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), it has never held that they may be *compelled* by federal law to restrict such speech, leaving the states free to protect such speech in their state constitutions. *E.g.*, *Pyle v. South Hadley School Committee*, 423 Mass. 283, 667 N.E.2d 869 (1996) (Massachusetts law protects speech not protected by First Amendment under *Bethel*); *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 534 (1st Cir. 1995) (school is not obligated by federal law to restrict such speech). Moreover, the mere fact that schools are allowed to restrict patently offensive speech in general, does not mean that the federal government can compel them through Title IX to single out racially and sexually offensive speech for prohibition. *See Pyle v. South Hadley School Committee*, 861 F. Supp. 157, 170-74 (D. Mass. 1994) (voiding sex/race harassment policy as unconstitutional viewpoint discrimination; while school could ban *all* lewd speech, it could not constitutionally single out only racially or sexually offensive speech for prohibition), *citing R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

regulations prohibiting peer-on-peer harassment under Title IX and Title VI as requiring broad speech codes banning even individual instances of racially or sexually offensive speech. *See Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12045-46 (Mar. 13, 1997) (Title IX regulations); *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11448 (March 10, 1994). For example, in 1994, it found the Santa Rosa Junior College liable for sexual harassment because it failed to prevent the former boyfriend of a campus women's rights activist from making derogatory remarks about her in private messages he sent to another male student in the college's electronic bulletin board system. *Big Sister Is Watching*, Sacramento Bee, September 27, 1994, at B6; Tamar Lewin, New York Times News Service, *Single Sex-Bytes*, Chicago Tribune, Oct. 16, 1994, at 5. In exchange for not cutting off the College's federal funds, OCR demanded that it adopt a speech code banning "comments that harass, denigrate, or show hostility toward a person or group based on sex, race, or color, including slurs, negative stereotypes, jokes, or pranks." *Lewin, supra; accord Big Sister Is Watching*. No exception was made for political beliefs which "denigrate" groups, such as arguing that girls are smarter than boys, or that boys have greater mathematical or spatial reasoning capabilities than girls. *Cf. Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (striking hostile-environment sexual harassment policy challenged by graduate student who wished to discuss inherent gender-based differences); Anthony Lewis, New York Times News Service, *Speech Code Fit For Orwell*, Dallas Morning News, Nov. 30, 1995, at 35A (noting that criticism of unmarried mothers might be deemed sexually harassing).



Similarly, OCR has indicated that controversial political opinions on subjects such as affirmative action may constitute "peer harassment" under Title VI and Title IX. Stuart Taylor, senior columnist for the *Legal Times*, asked Judith Winston, the general counsel of the Education Department with oversight over OCR, whether a hypothetical heated discussion of affirmative action based on the landmark reverse discrimination suit *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996), would violate Title VI's prohibition on peer harassment. Taylor, *A Clintonite Threat to Free Speech*, May 9, 1994, *Legal Times*, Opinion and Commentary, p.2.<sup>3</sup> Winston responded that the guidelines did not enable her to "com[e] to any conclusion whether that

<sup>3</sup> Stuart Taylor framed the discussion as follows:

Imagine a heated discussion of affirmative action in a constitutional law class at, say, the University of Texas. A white student complains that the Supreme Court has rigged the system so that her brother was denied admission to the law school while "less qualified blacks" were admitted. A black student calls her a "racist liar." As the debate heats up, the professor says: "Look, reasonable people disagree about this, but we should recognize two facts: First, until a few decades ago, black people were excluded altogether from this law school and subjected to shameful discrimination in every area of life. Second, according to records on file in a pending lawsuit, the vast majority of our current minority students were admitted ahead of whites with higher grades and test scores, on the basis of racial preference." This prompts a black student to shout loudly, "Are you saying we're not good enough to be here?" The professor says no; the white student growls, "You shouldn't have gotten in on a quota, over my brother."

is the type of incident that would be found to be racially discriminatory or racial harassment under Title VI." *Id.*

"Whether it is constitutional for a public college or graduate school to use race or national origin in its admissions process is an issue of great national importance." *Texas v. Hopwood*, 518 U.S. 1033 (1996)(Ginsburg, J., joined by Souter, J., commenting on the denial of the petition for certiorari). Yet OCR's rules cast doubt on whether students at the University of Texas -- the very school whose policies gave rise to the nationally-debated *Hopwood* case -- would even be allowed to discuss that case in vigorous terms, even though the First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). See also *Podberesky*, 838 F. Supp. at 1093-94 (finding "hostile racial" environment based partly on school paper's "commentary and letters highlighting . . . preferential treatment" of black students).

University officials widely understand that OCR's peer harassment guidelines are designed to prevent offensive and unpopular viewpoints from being expressed. For example, "[t]he Chancellor of the [University of Massachusetts at] Amherst campus, David K. Scott, responded to criticism [of the university's proposed speech code] by suggesting that a code was required by federal Department of Education regulations." Anthony Lewis, *New York Times News Service, School Drafts Speech Code Fit for Orwell*, *Dallas Morning News*, Nov. 30, 1995, at 35A ("the federal regulations need revision. It is time to stop letting the elastic concept of a 'hostile environment' menace freedom of speech, at universities of all places").

Similarly, Stanford's hate-speech code was adopted in order to comply with the "peer harassment" requirements of Titles VI and IX as construed by OCR. Thomas C. Grey, *How to Write a Speech Code Without Really Trying*, 29 U.C. Davis. L. Rev. 891, 907 (1996). Stanford's harassment policy echoed OCR's proposed speech code for Santa Rosa Junior College, in that it prohibited even single instances of offensive speech, although it took a more moderate position than OCR by punishing only offensive epithets and "personal vilification." *See id.* As the drafter of Stanford's speech code observed, individual instances of offensive speech must be punished to comply with Title IX's peer harassment provisions, since "a hostile environment can arise from single acts of discrimination on the part of many different individuals. . . it is necessary to prevent the individual actions that, when added up, amount to" a hostile environment, including individual instances of offensive speech. *Id.*; *see also Richardson v. CHI Institute*, No. 96-CV-7524 (E.D. Pa. Jan. 14, 1998), Docket Document No. 45 (awarding plaintiff \$102,000 against institution of higher learning under Title IX because the institution failed to prevent its students from telling coarse sexual jokes that cumulatively developed into a hostile learning environment over time). Stanford's hate-speech code was later struck down under California law, which applies free speech guarantees even to private universities such as Stanford. *Corry v. The Leland Stanford Junior University*, Case No. 740309 (Cal. Super. Ct., Santa Clara Cty., Order on Preliminary Injunction, February 27, 1995)(voiding Stanford's harassment policy under California's Leonard Law).

Relying on OCR's guidelines, Kansas' Attorney General has issued an opinion declaring that campus speech codes are not only permissible, but necessary to

comply with Title IX. Kan. Atty. Gen. Op. No. 96-1, 1996 WL 46866 (Jan. 12, 1996), *citing* 59 Fed. Reg. 11,452 (1994), OCR Cas. No. 05-90-2024. According to the Attorney General, colleges must restrict a wide range of speech, such as "perpetuation of sex-based stereotypes," to avoid a "hostile environment." *Id.* The Attorney General attacked the case that overturned the University of Michigan speech code as being in conflict with OCR's construction of Title IX. *Id.*, *citing Doe v. Univ. of Michigan*, 721 F. Supp. at 867, 59 Fed. Reg. 11449.

Although campus speech codes were once typically limited to narrow classes of arguably unprotected speech, such as racial epithets, they have now become much broader in their reach under the influence of federal hostile environment regulations, encompassing even unintentionally offensive academic dialogue. *E.g.*, Alan Kors & Harvey Silverglate, *The Shadow University* 86-96 (1998)(discussing application of campus harassment policies). The primary justification given for campus speech codes across America today is the need to prevent a hostile learning environment. *Id.* at 86.

### **C. Hostile Environment Regulations Have Frequently Been Used to Silence Dissent on College Campuses.**

Judges and legal scholars are right to be concerned over the First Amendment implications of extending harassment law to college students' speech. Speech on many important political and social issues, such as affirmative action and feminism, is perceived by some as contributing to a hostile learning environment. Hostile environment harassment charges have had a grave chilling effect on academic, artistic, and press freedoms on campus.



1. *Academic Freedom.* -- Professor Joseph Conlin, an award-winning historian at Chico State University, was found to have engaged in hostile-environment racial harassment for stating that under Chico State's racial hiring goals, "little more is required of affirmative action faculty than that they show evidence of a majority of vital life signs." Richard Ek, *College Drops Harassment Ban*, S.F. Chron., Dec. 4, 1993, at A18.

2. *Artistic Freedom.* -- Hostile-environment sexual harassment prohibitions have had a chilling effect on the study of the arts, forcing arts instructors to censor their curriculum. Melissa Balmain, *Readers: This Column Might Offend You*, *Orange County Register*, Dec. 7, 1994, Metro 1. The drawing of nude models has diminished; photos of Michelangelo's "David" are shown from the waist up to avoid litigation; and a professor at California State University at Northridge is said to have been fired for asking students to make nude sketches. *Id.* A student sued for sexual harassment after being shown a movie based on Edgar Allen Poe's classic short story "The Pit and the Pendulum," which she perceived as sexually humiliating. *Nevermore for Poe Film, Lawsuit Says*, S.F. Examiner, Aug. 30, 1994, at A2.

Hostile-environment regulations have repeatedly been used to censor the arts. *E.g.*, 2 People for the American Way, *Artistic Freedom Under Attack* 7 (statistics), 50, 92, 111, 121, 156, 197, 208, 214 (1994). For example, an exhibition on loan from the Museum of Modern Art, *Nudes*, was removed from Colgate University's Picker Art Gallery after administrators claimed it contributed to a hostile environment. *Id.* at 156. Classical nude paintings are among the most common targets of this form of censorship. *E.g.*, Nat Hentoff, *Sexually Harassed by*

*Francisco Goya*, Wash. Post, Dec. 27, 1991, at A21 (painting removed from classroom where it hung for years after professor said it harassed her).

3. *Freedom of the Press.* -- Campus newspapers have been subjected to disciplinary action for discussing controversial issues such as affirmative action, feminism, homosexuality, and the death penalty. For example, college administrators at the University of Lowell forced the editors of the *Connector*, the student newspaper, to stand trial for "creating a hostile environment on campus" after the editors ran an editorial cartoon which depicted a big-bellied death penalty advocate with the caption "none of his friends are young black males," beside an animal rights activist with the caption "some of my best friends are laboratory rats." David G. Savage, *Forbidden Words on Campus*, L.A. Times, Feb. 12, 1991, at A1. Despite the liberal content of the cartoon, which derided the death penalty on the basis of its disparate impact on young black males, students filed charges against the paper for its "racial insensitivity" for what they perceived as its having "very boldly compared young black males to laboratory animals." *Id.* The editors eventually faced disciplinary sanctions including probation, 30 hours of community service, and removal from the newspaper's staff. *Id.*

Fortunately, until recently, the "harassment" rationale for restricting speech on college campuses was rejected repeatedly by the courts, at least insofar as it applies to students. *E.g.*, *UWM Post*, *supra*. The recognition that the First Amendment protects artistic, academic, and press freedoms has given University administrators reason to pause before restricting "harassing" speech. *E.g.*, David G. Savage, *Forbidden Words on Campus*, L.A. Times, Feb. 12, 1991, at A1 (sanctions for the editors of the

*Connector* dropped after they threatened a First Amendment lawsuit).

The possibility that "hostile environment" lawsuits will be brought in part on the basis of speech on political or social issues with sexual or racial overtones is very real. The fact that speech may be reasoned and civilly expressed does not prevent it from being "hostile" or "offensive" to those who deeply disagree with it. As the head of Harvard's African-American Studies Program noted in arguing against Stanford's harassment policy on free-speech grounds, a black Stanford freshman would probably find a sharp, empirically-based criticism of Stanford's affirmative action policy to be more offensive than an epithet, contrasting these two statements:

"LeVon, if you find yourself struggling in your classes here, you should realize that it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared and often undertalented black students in demanding educational environments like this one. The policy's egalitarian aims may be well intended, but given the fact that aptitude tests place African-Americans almost a full standard deviation below the mean, even controlling for socioeconomic disparities, they are also profoundly-misguided. The truth is, you probably don't belong here, and your college experience will be a long downhill slide."

"Out of my face, jungle bunny."

Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, New Republic 37, 45 (Sept. 20 & 27, 1993).

A recent case illustrates that important discussions of race and gender can be more offensive (and thus more likely to trigger a harassment lawsuit) than simple name-calling. *Monteiro v. Tempe Union High School District*, 158 F.3d 1022 (9th Cir. 1998). *Monteiro* involved a harassment suit based partly on a school district's use of two celebrated books (*Huckleberry Finn* and *A Rose for Emily*) which use the word "nigger" to illustrate the ugliness of racism and based partly on alleged name-calling by classmates using the word "nigger." What angered the plaintiff most was not the racist name-calling, but the school district's use of the racially offensive books. *Schools Liable for Kids' Racial Slurs*, Nat'l L.J., Nov. 2, 1998, at A10 (if school board hadn't "assigned that material" to plaintiff, "we wouldn't have sued").

#### **D. Applying Hostile Environment Regulations to College Campuses Under Title IX Would Require Broad Restrictions on Core Political Speech.**

Echoing Professor Gates, legal scholars have concluded that "hostile environment" harassment law does indeed restrict reasoned discussion in the same fashion as it restricts racial epithets. "Note what [Title VII's] definition [of harassment as speech that creates a hostile environment] does *not* require. It does not require that the speech consist of obscenity or fighting words or threats or other constitutionally unprotected statements. It does not require that the speech be profanity or pornography, which some have considered 'low value.' Under the definition,



it is eminently possible for political, religious, or social commentary, or 'legitimate' art, to be punished." Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict*, 85 Geo. L. J. 627, 629 (1995). Many commentators agree that harassment law reaches core political speech, and have concluded that it cannot constitutionally do so.<sup>4</sup>

Core religious speech, such as Bible verses on paychecks and religious articles in the company newsletter, can contribute to a hostile environment. *Brown Transport Corp. v. Pennsylvania Human Relations Commission*, 578 A.2d 555, 562 (Pa. Commw. 1990). Similarly, speech on important racial issues, such as affirmative action, can be very offensive to members of particular groups and thus contribute to a hostile environment. *Joseph v. Publix Supermarkets, Inc.*, 983 F. Supp. 1431, 1435 (S.D. Fla. 1997)(co-worker's assertion that plaintiff got her job because she was "a black woman" and that scholarship fund for blacks was "reverse discrimination" contributed to hostile environment); *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1093-94 (D. Md. 1993)(finding "hos-

<sup>4</sup> See, e.g., Jessica Karner, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 Cal. L. Rev. 637, 637, 677 (1995); David Jaffe, *Walking the Constitutional Tightrope: Balancing Title VII Hostile Environment Sexual Harassment Claims with Free Speech Defenses*, 80 Minn. L. Rev. 979, 1007-08 (1996); Wayne Robbins, *When Two Liberal Values Collide in an Era of Political Correctness: First Amendment Protection as a Check on Speech-Based Title VII Hostile-Environment Claims*, 47 Baylor L. Rev. 789 (1995). Moreover, hostile-environment regulations are "content-based, viewpoint-discriminatory restrictions on speech." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir.), cert. denied, 516 U.S. 974 (1995); Volokh, *Harassment Law & Free Speech Doctrine*, <http://www.law.ucla.edu/faculty/volokh/harass/SUBSTANC.HTM#96>.

tile racial" environment sufficient to support blacks-only scholarship based largely on independent school newspaper's "racist letters to the editor and articles, commentary and letters highlighting black academic failure [and] preferential treatment" of black students), *rev'd on other grounds*, 38 F.3d 147, 154-55 (4th Cir. 1994)(finding that racially hostile environment could not support scholarship program where it was not traceable to the university's segregated past), cert. denied, 514 U.S. 1128 (1995); Cynthia Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 Tex. L. Rev. 687, 723 (1997) ("criticizing real or perceived quotas, preferences, or affirmative action efforts based on race or gender are likely to offend some workers and may contribute to a discriminatory hostile environment," even though such speech is vital to the "democratic process" and thus should be "protected within the workplace.").

The chilling effect of hostile-environment regulations is aggravated by the fact that a hostile environment claim can be based largely on comments by a variety of different speakers that the plaintiff learns about second or thirdhand -- even comments uttered before he was even hired! *Schwapp v. Avon*, 118 F.3d 106, 111 (2d Cir. 1997)("The district court erred in failing to consider the eight additional incidents that did not occur in Schwapp's presence. . . includ[ing] one racially hostile comment made prior to Schwapp's employment."). In the university setting, this would mean that a student could sue based in part on what he read in a student newspaper. Moreover, if one student had a sexual discussion with another student in the privacy of the speaker's own dormitory room, and a third party learned about it, that third party could demand discipline of the speaker. And a university could not safely exempt any of these instances of speech

from discipline so as to create breathing space for freedom of speech, since a hostile environment may cumulatively develop over time from the comments of many different speakers, each of which is merely offensive, and none of which is *individually* severe enough to create a hostile work environment. See *Richardson v. CH Institute*, No. 96-CV-7524 (E.D. Pa. Jan. 14, 1998), Docket Document No. 45 (awarding plaintiff \$102,000 against institution of higher learning under Title IX because the university failed to prevent its many students from telling coarse sexual jokes that cumulatively developed into a hostile learning environment for the plaintiff); Daniel G. McBride, *Guidance for Student Peer Sexual Harassment? Not!*, 50 Stan. L. Rev. 523, 554 (1998) (Under the harassment "guidance" promulgated by the Office for Civil Rights, "If each individual harasser acts within his First Amendment rights but the cumulative effect is severe and pervasive to the victim," the school is liable for "peer harassment").

Therefore, holding universities liable for "peer harassment" based on Title VII standards would effectively require them to discipline students for *any* instance of racially or sexually offensive speech, and to adopt "zero-tolerance" prohibitions against racist and sexist speech. See Jessica Karner, *Political Speech, Sexual Harassment, and a Captive Audience*, 83 Cal. L. Rev. 637, 658 (1995) ("To avoid the possibility of liability, each offensive remark must be eliminated from the workplace"); Volokh, 85 Geo. L. J. at 638 ("The employer's only reliable protection is a zero-tolerance policy") (citing court cases and the advice of many management employment lawyers to their clients); Cynthia Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 Tex. L. Rev. 687, 698 n.45 (1997). Such necessary means of avoiding liability for ha-

arrassment would leave no breathing space for free speech on campus, and would violate this Court's rule that "[b]-road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedom." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Such a result is wholly unacceptable in colleges and universities, which are "peculiarly the marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1971).<sup>5</sup> "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses." *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 836 (1995). Even racist and sexist speech is protected, *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), and it is no more acceptable to ban racist and sexist speech on campus than it is in society as a whole. "[T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community large." *Healy v. James*, 408 U.S. 169, 180 (1971); *accord Thonen v. Jenkins*, 491 F.2d 722 (4th Cir. 1973) (students' free speech rights "on college campuses are coextensive with those in the community at large") (citing *He-*

<sup>5</sup> Cf. Kenneth Jost, *Questionable Conduct: There Can Be A Fine Line Between Preventing Sexual Harassment and Punishing Protected Speech*, 80 ABA Journal 70, 74 (Nov. 1994) (quoting "Deborah Ellis of NOW [LDEF]" -- ironically, now an amicus for plaintiff in this case -- as saying that speech that creates a hostile work environment "can be banned on the job," because it "is a 'place for work, not a forum for the exchange of ideas,'" unlike college campuses).



aly).

Holding universities liable for the "harassing" speech of students would produce a legal anomaly, reducing students to second class status in terms of free speech rights. On the streets, Nazis could continue to march, *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978), and pornographers could continue to peddle their wares. *Hudnut, supra*. Yet on a nearby college campus, students would not be permitted to insensitively criticize affirmative action, *see Joseph v. Publix Supermarkets, Inc.*, 983 F. Supp. at 1435 (S.D. Fla. 1997), nor could they safely tell sexual jokes or discuss their private lives even in the privacy of their own dormitory rooms, since sexual humor and references are deemed inherently harassing by many courts. *E.g., Dernovich v. City of Great Falls*, Mont. Hum. Rts. Comm'n No. 9401-006004 (Nov. 28, 1995)(finding hostile environment solely based on nonsexist off-color jokes distributed by plaintiff's female and male colleagues once or twice a month over several years, which constituted "sexual harassment" because they "offended [complainant] as a woman"); *Cardin v. Via Tropical Fruits*, 1993 U.S. Dist. LEXIS 163-02, at \*24-25 & n.4 (S.D. Fla. July 9, 1993)("every incident" of sexual humor reported by plaintiff was harassment, even though many of the jokes and cartoons "depicted both men and women" and were not aimed at her); *Volokh, supra* (citing cases); <http://www.law.ucla.edu/faculty/volokh/harass/breadth.thm> (citing additional cases). Surely, this is not what Congress intended when it enacted Title IX.

Construing Title IX to reach the private conduct of students also raises serious privacy concerns. The courts have long treated commonplace forms of noncoercive

sexual behavior as probative of sexual harassment: "[M]ost complaints of sexual harassment are based on actions which. . . may be permissible in some settings," and prohibiting what would be considered a "compliment" outside the workplace "is, in many cases, the whole point of the sexual harassment claim." *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 n.13 (11th Cir. 1987). Thus, applying Title IX to what students say and do in their apartments and dormitory rooms would effectively impose Title VII workplace norms on their private lives -- norms under which romantic overtures and sexual banter are generally presumed to be injurious. *E.g., Volokh, supra* (sexual banter); *Dernovich, supra* (sexual humor); *Cardin v. Via Tropical Fruits, supra* (same).<sup>6</sup> Such regulation would intrude deeply into aspects of students' private lives, such as their associational activities and dating relationships, which are protected by the First Amendment freedom of intimate association. *See, e.g., Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984)(dating); *Louisiana Debating and Literary Association v. New Orleans*, 42 F.3d 1483 (5th Cir. 1995)(antidiscrimination ordinance which authorized investigations of the activities of private clubs violated freedom of intimate association).

---

<sup>6</sup> The fact that hostile-environment regulations require that behavior be "unwelcome" to constitute harassment provides no protection for privacy. First, the fact that conduct is "welcome" to its target does not make it "welcome" to those who overhear it or learn about it secondhand. *See Schwapp*, 118 F.3d at 111. Second, a complainant does not have to inform the accused that his behavior is "unwelcome" before filing a complaint and triggering the institution's duty to take "remedial action." Since hostile-environment regulations do not even require a complainant to provide fair warning to the accused, even when it would be easy to do so, they are not "narrowly tailored" to eliminating discrimination.

## II. THIS COURT SHOULD CONSTRUE TITLE IX NARROWLY TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS.

As we have explained above, interpreting Title IX to reach students' speech, as the Office for Civil Rights advocates, would raise serious constitutional questions. Ordinarily, an agency's interpretation of the statute it administers is entitled to deference by the courts so long as it does not conflict with a clearly expressed congressional intent and it is reasonable. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 574 (1988), citing *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 n.9 (1984). However, this rule has an important exception. No deference is owed the administrative agency when its interpretation would raise serious constitutional questions; to the contrary, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 574 (1988), citing *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (1979). Thus, OCR's interpretation should be rejected if a reasonable, more narrow interpretation of Title IX exists. This is true even if OCR's Policy Guidance regarding peer harassment would ordinarily be deemed an agency regulation to be given deference by the courts.

Unlike OCR, some civil rights agencies have wisely construed the rules of harassment liability so as to avoid potential constitutional conflicts. For example, the Illinois Human Rights Commission, citing First Amendment con-

cerns, has held that a state civil rights law barring discrimination in public accommodations does not hold schools liable for "hostile learning environments." *Haney v. University of Illinois*, No. 1993SP0431, 1994 WL 880339. This Court should likewise construe Title IX so as to avoid potential constitutional problems.

## III. SERIOUS CONSTITUTIONAL QUESTIONS CAN BE AVOIDED BY CONSTRUING TITLE IX AS MODELLED ON THE EQUAL PROTECTION CLAUSE, WHICH DOES NOT REACH STUDENT SPEECH OR CONDUCT.

A reasonable, narrower alternative to OCR's construction of Title IX exists. Title IX can be modelled on the Equal Protection Clause, which does not place a duty on educational institutions to regulate student interaction or prevent peer-on-peer harassment. Such an interpretation would be in keeping with this Court's construction of Title VI, on which Title IX is modelled. By contrast, OCR's broad interpretation of Title IX liability rests on Title VII analogies undermined by this Court's ruling in *Gebser v. Lago Vista Independent School District*, 118 S.Ct. 1989 (1998), that Title VII negligence and constructive-notice principles do not apply to Title IX claims. *Gebser*, 118 S.Ct. at 1995 (rejecting OCR's position that constructive notice suffices); *contra Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, \*11 (9th Cir. 1998) (relying on OCR guidance rejected in *Gebser* to hold that "a district may have either actual or constructive notice of racial harassment"), citing 59 Fed. Reg. 11450.

Title IX "was modelled after Title VI of the Civil Rights Act of 1964." *Gebser*, 118 S.Ct. at 1997, citing



*Cannon v. University of Chicago*, 441 U.S. 677, 694-96 (1979). In construing Title VI, this Court has repeatedly looked to the standards applicable to state institutions under the Equal Protection Clause of the Fourteenth Amendment, rather than to Title VII. For example, institutions' Title VI liability for segregation "extends no further than the Fourteenth Amendment." *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992). Similarly, Title VI subjects public and private universities alike to the same standards for affirmative action plans that govern public universities under the Fourteenth Amendment, *Regents of the University of California v. Bakke*, 438 U.S. 265, 287 (1978) (Opinion of Powell, J., announcing the judgment of the Court); *id.* at 325 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.), rather than applying the very different standards governing affirmative action plans under Title VII. *Steelworkers v. Weber*, 443 U.S. 193, 206 n.6 (1979). Since Title IX closely parallels the Equal Protection Clause, liability for harassment of public and private institutions under Title IX should resemble public institutions' liability under the Equal Protection Clause.

Liability for harassment is very different under the Fourteenth Amendment than under Title VII. Under Title VII, an institution is liable for mere "negligence" towards harassment, *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2289 (1998) (courts have "uniformly judg[ed] employer liability. . . under a negligence standard"), and it is sufficient if the harasser -- rather than the institution or its agents -- is motivated by sex, see *Oncale v. Sundowner Offshore Services*, 118 S.Ct. 998, 1002 (1998). It is only by overlooking the essential fact that an employer's liability under Title VII is based on negligence, not discriminatory intent, that courts have managed to recognize "peer harassment" claims under Title IX despite Title IX's re-

quirement of discriminatory intent by the institution. See *Brzonkala v. Virginia Polytechnic Institute*, 132 F.3d 949, 958 (4th Cir. 1997) (erroneously asserting that peer-harassment liability holds "[a] defendant educational institution, like a defendant employer" "liable for its own discriminatory actions"), *reh'g en banc granted, opinion vacated*, Feb. 5, 1998; *Doe v. University of Illinois*, 138 F.3d 653, 662 (7th Cir. 1997) (erroneously asserting that "failure to take prompt, appropriate action" against accused harasser is "presumably, perhaps even necessarily, a manifestation of intentional sex discrimination"); *id.* at 669 (Coffey, J., dissenting) (criticizing court rulings creating peer harassment liability for confusing "negligence" with the "discriminatory intent" needed for damages under Title IX).

Unlike Title VII, the Fourteenth Amendment holds a state institution liable only for its own discrimination, e.g., discriminatory acts by its employees, *The Civil Rights Cases*, 109 U.S. 3 (1883), and "erects no shield against merely private conduct, however discriminatory or wrongful." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1962). A public institution is not liable for the discriminatory or wrongful acts of private parties, even when it is "deliberately indifferent" to their acts. "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982); see *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 546 (1987) (Federal government's "[m]ere approval of or acquiescence in" entity's discriminatory conduct did not make it liable for the discrimination).

For example, a state agency which gave a scarce

liquor license to a discriminatory private club despite its open policy of racial discrimination was not liable under the Equal Protection Clause for the discrimination, even though the club was pervasively regulated by state licensors. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972). Similarly, even though the Federal government subsidized, chartered and extensively regulated the U.S. Olympic Committee, which could not even change its charter without complying with federal guidelines, the Committee's alleged discrimination did not violate equal protection. *San Francisco Arts & Athletics*, 483 U.S. at 546. Thus, it is not enough that a school's actions have the foreseeable effect of facilitating private discrimination or harassment. See *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979) ("'[d]iscriminatory purpose' implies more than intent as . . . awareness of consequences. . . . It implies that a decisionmaker selected or reaffirmed a particular course of action. . . 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

Since students are generally not state actors, public schools are not liable for student-on-student harassment under the Fourteenth Amendment (except in the exceedingly rare case that school officials harbored a discriminatory animus against the complainant on account of her sex). E.g., *Davis v. Monroe County Board of Education*, 74 F.3d 1186, 1188 (11th Cir. 1996) (affirming dismissal of plaintiff's equal protection claim without discussion), *rev'd in part on other grounds*, 120 F.3d 1390 (11th Cir. 1997) (en banc), *cert. denied in relevant part, cert. granted in part*, 119 S.Ct. 29 (1998); *UWM Post v. Board of Regents*, 774 F.Supp. 1163, 1176 ("Since students are generally not state actors, the . . . Fourteenth Amendment equal protection argument is inapplicable to this case"); *Doe v. Londonderry Sch. Dist.*, 970 F. Supp. 64, 77 (D. N.H.

64, 77 (D. N.H. 1997) (same) (citing *Soto v. Flores*, 103 F.3d 1056, 1067 (1st Cir. 1997), in which a deliberately indifferent response to domestic violence against a woman did not violate the Equal Protection Clause); Thomas Baker, *Sexual Misconduct Among Students: Title IX Court Decisions in the Aftermath of Franklin v. Gwinnett County*, 80 Ed. Law. Rep. 519, 533 (1996) ("[e]very one of the courts confronted with a Fourteenth Amendment claim in addition to the Title IX cause of action dismissed the constitutional cause of action"). See *Rowinsky v. Bryan Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996) (discriminatory intent not shown by school's failure to remedy harassment by students, as opposed to its own agents; disparate treatment of male and female harassment complainants on account of their sex must be shown to establish Title IX liability), *cert. denied*, 117 S.Ct. 165 (1996).

Since the Equal Protection Clause requires a showing that a school official refused to discipline a student accused of harassment "'because of,' not merely 'in spite of,'" the complainant's sex, *Feeney, supra*, 442 U.S. at 279, if an official fails to respond to student-on-student harassment out of sloth, ineptitude, or -- in the case of verbal harassment -- a desire not to chill free speech, the official is not liable for the harassment under the Equal Protection Clause, since her purpose in failing to respond is not discriminatory. Many states have broader free speech guarantees than the federal constitution, *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980) (states may constitutionally extend their free speech guarantees to cover speech not protected by the federal law); *Pyle v. South Hadley School Committee*, 423 Mass. 283, 667 N.E.2d 869 (1996) (state law protected speech by high school students that was not protected under the federal First Amendment), and school officials are not acting out



of a discriminatory purpose when they honor these state guarantees in refusing to discipline students for "harassing" speech. *Corry v. Stanford, supra* (voiding harassment rule under California law, which applies broad free-speech guarantees to both college and high school students); see *Meltebeke v. B.O.L.I.*, 903 P.2d 351, 363 (Or. 1995)(state constitution protects unintentionally offensive religious speech that makes work environment hostile).

By contrast, the Equal Protection Clause does hold teachers liable for discriminatory harassment, since they are state actors.<sup>7</sup> *E.g.*, *Doe v. Taylor Independent School Dist.*, 975 F.2d 137, 138, 142-47 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993), *aff'd on other grounds*, 15 F.3d 443 (1994)(en banc), *cert. denied*, 513 U.S. 815 (1995). Moreover, under the Equal Protection Clause, as under this Court's construction of Title IX, an educational institution is liable for "deliberate indifference" in responding to harassment by teachers. *Compare Doe*, 975 F.2d at 138, 142-47 (Equal Protection Clause) and *Gebser*, 118 S.Ct. at 1999 (Title IX). This is because, in a

---

<sup>7</sup> This does not mean, of course, that the Fourteenth Amendment invariably trumps professors' First Amendment rights. Society has a compelling interest in promoting academic freedom, *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312-15 (1978), and harassment regulations may have to be interpreted more narrowly and precisely when applied to professors' classroom speech in order not to chill academic freedom. *E.g.*, *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1290 (1997)(successful as-applied challenge to sexual harassment policy by professor on vagueness grounds); *Silva v. Univ. of New Hampshire*, 888 F. Supp. 293, 314 (D.N.H. 1994)(same). *Cf. Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967)("standards of permissible statutory vagueness are strict in the area of [academic freedom] . . . government may regulate in the area only with narrow specificity").

limited sense, state employees *are* the state, which lacks a corporeal existence of its own, and can only act through employees, such as teachers. *Cf. Yniguez v. Arizonans for Official English*, 69 F.3d 920, 960 (9th Cir. 1995) (Koziński J., dissenting), *vacated*, *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997)("[g]overnment has no mouth, it has no hands or feet; it speaks and acts through people. Government employees must do what the state can't do for itself, because it lacks corporeal existence; in a real sense, they *are* the state"). Thus, the mere fact that school systems are deemed to intentionally discriminate when they are "deliberately indifferent" to teacher-student harassment under the Equal Protection Clause and Title IX does not mean that they "discriminate" when they are deliberately indifferent to student-on-student harassment.

While teachers are state actors, students are not, and only the grandest legal fiction would impute their discriminatory intent to the government merely because it fails to discipline them. For example, if Nazis periodically march through Skokie, thereby creating a hostile residential environment for Jews, the City is not liable for its "deliberate indifference" in failing to prevent the marches. *Cf. Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). The reason is that while the Fourteenth Amendment requires the State to restrict the bigoted conduct of its employees, including teachers, it places no duty on the state to prevent such behavior by private parties, such as students. *Cf. Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)("careful adherence to the 'state action' requirement preserves an area of individual freedom"). Thus, public institutions are not liable under the Equal Protection Clause for failing to remedy harassment by students. And since the duties of public and private schools under Title IX are modelled on those

of public schools under the Equal Protection Clause, Title IX does not hold institutions liable for failing to remedy harassment by students, either.

### CONCLUSION

For these reasons, this Court should affirm the judgment of the Eleventh Circuit.

Respectfully submitted,

JAMES A. MOODY  
1101 30th Street, Ste. 300  
Washington, DC 20006  
(202) 944-8600

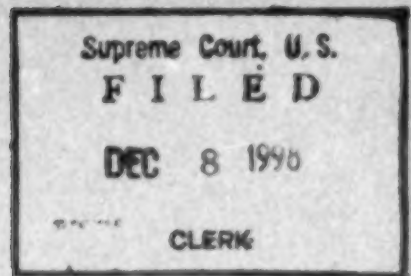
*Counsel for Amici Curiae  
Students for Individual Liberty  
and Student Association for  
Freedom of Expression*

December 1998



18

No. 97-843



IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1998

---

Aurelia Davis, as next friend of LaShonda D.,  
*Petitioner,*

vs.

Monroe County Board of Education,  
*Respondent.*

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS  
ASSOCIATION, NATIONAL ASSOCIATION OF SECONDARY  
SCHOOL PRINCIPALS, AMERICAN ASSOCIATION OF  
SCHOOL ADMINISTRATORS, AND THE  
GEORGIA SCHOOL BOARDS ASSOCIATION  
IN SUPPORT OF RESPONDENT

*Julie Underwood*  
National School Boards  
Association  
1680 Duke Street  
Alexandria, Va. 22314  
(703) 838-6710

*Lisa A. Brown\**  
*Jennifer Jacobs*  
Bracewell & Patterson, L.L.P.  
711 Louisiana, Suite 2900  
Houston, Texas 77002-2781  
(713) 223-2900  
*\*Counsel of record*

*Attorneys for Amici Curiae*

**BEST AVAILABLE COPY**

42pp

## QUESTION PRESENTED

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which prohibits sex discrimination in federally funded education programs and activities, recognizes a cause of action for peer hostile environment sexual harassment.



## TABLE OF CONTENTS

QUESTION PRESENTED .....	ii
TABLE OF AUTHORITIES .....	v
INTEREST OF AMICI CURIAE .....	1
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	6
I. Title IX is not an all-purpose school safety statute; it is an anti-discrimination statute. ....	6
A. To state a claim for damages, a Title IX plaintiff must show that, <i>but for</i> her gender, the school district's response to her complaint would have been different. ....	6
B. If Petitioner's Argument Prevails, It Will Be Tantamount To Creating a Minimum Disciplinary Code to Avoid Sexual Harassment Liability. ....	10
II. Damages are available under Title IX only when <i>program administrators</i> engage in discrimination. Misconduct by teachers and students cannot result in liability. ....	15
A. School district liability may not be based upon the conduct of employees who lack administrative authority. ....	15

B.	Agency theory and the identity of the "discriminator" are relevant. ....	20
III.	Congress did not intend to jeopardize school district funds in the absence of discriminatory conduct attributable to the recipient of the federal funds. ....	23
IV.	During 1992-93, school districts were not on notice that Title IX governed the issue of student-on-student misconduct. There were <i>no</i> federal guidelines on sexual harassment of students until 1996. ....	26
V.	School districts have responded to recent concerns about student misconduct and harassment by adopting policies and providing training to staff and students. ....	27
	CONCLUSION .....	30
	APPENDIX A SAMPLE SCHOOL NONDISCRIMINATION POLICY	

## TABLE OF AUTHORITIES

### CASES

<i>Bethel Sch. Dist. No. 403 v. Fraser</i> , 478 U.S. 675 (1986) .....	12
<i>Board of Educ. v. McCluskey</i> , 458 U.S. 966 (1982) .....	7, 12
<i>Cannon v. University of Chicago</i> , 441 U.S. 677, 704 (1979) ..	17
<i>City of Los Angeles v. Manhart</i> , 435 U.S. 702 (1978) .....	23
<i>Collins v. City of Harker Heights, Tex.</i> , 503 U.S. 114 (1992) ..	20
<i>Davis v. Monroe County Board of Educ.</i> , 120 F.3d 1380 (11th Cir. 1997) .....	25
<i>DeShaney v. Winnebago County Dept. of Social Services</i> , 489 U.S. 189 (1988) .....	22
<i>Doe v. Petaluma City Sch. Dist.</i> , 830 F.Supp. 1560 (N.D. Cal. 1993), <i>reconsidered and revised</i> , 949 F.Supp. 1415 (N.D. Cal. 1996) .....	26
<i>Dorothy J. v. Little Rock Sch. Dist.</i> , 7 F.3d 729 (8th Cir. 1993) .....	22
<i>D.R. by L.R. v. Middlebucks Area Vocational Sch.</i> , 972 F.2d 1364 (3d Cir. 1992) .....	22
<i>Faragher v. City of Boca Raton</i> , 118 S.Ct. 2275 (1998) .....	14
<i>Fowler v. Bryan Indep. Sch. Dist.</i> , 1998 Westlaw (Tex. App.--Houston [1st Dist.] July 2, 1998) .....	12



<i>Franklin v. Gwinnett County Pub. Schs.</i> , 503 U.S. 60 (1992) .....	10, 14, 17, 21
<i>Garza v. Galena Park Indep. Sch. Dist.</i> , 914 F.Supp. 1437 (S.D. Tex. 1994) .....	26
<i>Gebser v. Lago Vista Indep. School District</i> , 118 S.Ct. 1989 (1998) .....	<i>passim</i>
<i>Graham v. Independent Sch. Dist., No. I-89</i> , 22 F.3d 991 (10th Cir. 1994) .....	21
<i>Guardians Ass'n v. Civil Service Comm. of New York</i> , 463 U.S. 582 (1983) .....	17, 23
<i>Leija v. Canutillo Indep. Sch. Dist.</i> , 887 F.Supp. 947 (W.D. Tex. 1994), <i>rev'd</i> , 101 F.3d 393 (5th Cir. 1996) .....	25
<i>New Jersey v. T.L.O.</i> , 469 U.S. 325 (1985) .....	7
<i>Oncale v. Sundowner</i> , 118 S.Ct. 998 (1998) .....	24
<i>Palmer v. Merluzzi</i> , 868 F.2d 90 (3rd Cir. 1989) .....	12
<i>Pfeiffer v. School Bd. for Marion Center Area</i> , 917 F.2d 779 (3d Cir. 1990) .....	8
<i>Rosa H. v. San Elizario Indep. Sch. Dist.</i> , 106 F.3d 648 (5th Cir. 1997) .....	16
<i>Rowinsky v. Bryan Indep. Sch. Dist.</i> , 80 F.3d 1006 (5th Cir. 1996), <i>cert. denied</i> , 117 S.Ct. 165 (1997) .....	7, 8, 12
<i>Ruh v. Samerjan</i> , 816 F.Supp. 1326 (E.D. Wis. 1993), <i>aff'd</i> , 32 F.3d 570 (7th Cir. 1994) .....	7

<i>Seamons v. Snow</i> , 84 F.3d 1226 (10th Cir. 1996) .....	9
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975) .....	7
<i>Yusuf v. Vassar College</i> , 35 F.3d 709 (2d Cir. 1994) ..	7, 8, 9, 10

## STATUTES & ADMINISTRATIVE MATERIALS

20 U.S.C. § 1681 .....	<i>passim</i>
20 U.S.C. § 1682 .....	18, 19
20 U.S.C. § 1687 .....	18
20 U.S.C. § 8801 .....	18
34 C.F.R. § 101.1 <i>et seq.</i> .....	19
34 C.F.R. § 106.1 <i>et seq.</i> .....	18, 19, 23
42 U.S.C. § 1983 .....	20, 22
U.S. Department of Education, Office for Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12034 (March 17, 1997) .....	13, 14, 15

## OTHER

Comments of Rep. Mink, 117 Cong. Rec. 39252 (1971) .....	17
<i>The Mini-Digest of Education Statistics</i> < <a href="http://nces.ed.gov/NCES/pubs98/MiniDigest97/98020">http://nces.ed.gov/NCES/pubs98/MiniDigest97/98020</a> > ..	24, 25
National School Boards Ass'n, <i>Sexual Harassment in the Schools: Preventing and Defending Against Claims</i> (1993) .....	27

National School Boards Ass'n, *Student-to-Student Sexual Harassment: A Legal Guide for Schools* (1998) . . . . . 28

National Women's Law Center, *Righting the Wrongs: A Legal Guide to Understanding, Addressing and Preventing Sexual Harassment in the Schools* (1998) . . . . . 28

Texas Education Agency, Division of Performance Reporting, *Snapshot '96: 1995-96 School District Profiles* . . . . . 24, 25

No. 97-843

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1998

---

Aurelia Davis, as next friend of LaShonda D.,  
*Petitioner,*

vs.

Monroe County Board of Education,  
*Respondent.*

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

**BRIEF OF AMICI CURIAE  
NATIONAL SCHOOL BOARDS ASSOCIATION ET AL.  
IN SUPPORT OF RESPONDENT**

---

**INTEREST OF AMICI CURIAE**

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District



of Columbia, Guam, Hawaii, and the U.S. Virgin Islands.<sup>1</sup> NSBA represents the nation's 95,000 school board members. These board members govern 14,772 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation.

NSBA strongly believes in the policy of non-discrimination behind Title IX of the Education Amendments of 1972. Resolutions adopted by NSBA's Delegate Assembly at its national convention have encouraged all public school districts to adopt policies against the sexual harassment of students or employees, to provide clear complaint procedures, and to institute in-service training programs for teachers, administrators, and students.

The National Association of Secondary School Principals consists of more than 40,000 middle level and high school principals and assistant principals. NASSP programs include the National Honor Society, the American Technology Honor Society, the

---

<sup>1</sup>The parties' written consent to the filing of this brief has been filed with the Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

National Alliance of Middle Level Schools, and the National Alliance of High Schools.

The American Association of School Administrators, founded in 1865, has a membership of more than 14,000 educational leaders across North America and other countries. AASA strives to improve the condition of children and youth, prepare schools and school systems for the next century, and connect schools and communities to enhance the quality and effectiveness of school leaders. AASA seeks to achieve the highest quality of public education through effective school leadership.

The Georgia School Boards Association is a voluntary organization of the state's 180 local boards of education. The mission of GSBA is to provide educational leadership, professional services, and support to school districts and to assist them in achieving their goal of quality education for children.

## SUMMARY OF ARGUMENT

Congress did not pass Title IX to create a damages cause of action for students who are dissatisfied with student discipline in their schools. Under Title IX, a damages claim exists only when the administrative leadership of a school district sanctions a policy or practice of allowing students' genders to influence when and how discipline is administered. Any lesser standard would contravene the statute and this Court's precedents and would ignore this Court's admonishments that the federal courts avoid micromanagement of the public schools. The missing ingredient in Petitioner's argument is *any* indication that the school officials engaged in discrimination--that their alleged failure to respond was not merely negligent or senseless but was *discriminatory*. A Title IX plaintiff complaining about student misconduct must show that, *but for* her gender, the school's disciplinary response would have been different.

The Petitioner's proposal also must be rejected because it is, in essence, a strict liability proposal that would hold schools liable in damages for the isolated decisions of teachers who make erroneous discipline decisions. Title IX liability is tied to conduct

that can be fairly characterized as representing the policies of the grant recipient. The disciplinary decision of a teacher is no more binding on a school board than the harassment of the molesting teacher in *Gebser v. Lago Vista Indep. School District*, 118 S.Ct. 1989 (1998).

Petitioner's theory would have a serious financial impact on the nation's schools, contrary to the intent of the Congress in passing Title IX. The financial impact would be even greater in the student-on-student harassment context than in the teacher-student context because students outnumber teachers and are more likely to misbehave than adults. Was the act of pushing in the hallway "sexual harassment"--or was it merely pushing in the hall? Was after-school detention appropriate, or should a week-long suspension have been assigned? Which student was more credible? Neither Title IX nor this Court's precedents permit students to litigate such questions under the guise of a Title IX violation. Liability for damages under Title IX hinges on the existence of gender discrimination by the grant recipient--not on whether schools are successful in responding to allegations of student misconduct.



Refusal to create a new damages claim under Title IX will not encourage school officials to ignore discipline problems. Other types of legal consequences remain. Moreover, school officials have a moral and pedagogical incentive to respond to allegations of misconduct. Finally, across the nation, districts have responded to the challenge of sexual harassment by adopting strong anti-harassment policies and providing in-school prevention programs.

#### ARGUMENT

- I. Title IX is not an all-purpose school safety statute; it is an anti-discrimination statute.
  - A. To state a claim for damages, a Title IX plaintiff must show that, *but for her gender*, the school district's response to her complaint would have been different.

Congress did not pass Title IX to create a damages cause of action for students who are dissatisfied with the state of student discipline in their schools. Consistent with its wording and history, Title IX is violated only when the administrative leadership of a school district sanctions a policy or practice of allowing students' genders to influence when and how discipline is administered. The Supreme Court has long recognized that the federal courts should

not micromanage the public schools or interfere with the implementation of disciplinary rules.<sup>2</sup> Absent evidence of illegal considerations, "[i]t is not the role of the federal courts to set aside decisions of school administrators which the Court may view as lacking a basis in wisdom or compassion."<sup>3</sup>

To state a Title IX claim for damages, a plaintiff must allege facts indicating that school officials intended to discriminate on the basis of the student's gender. This proposition is demonstrated by numerous cases involving Title IX. See, e.g., *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994)<sup>4</sup>; *Rowinsky v. Bryan Indep. School Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996)<sup>5</sup>; *Ruh v. Samerjan*, 816 F.Supp. 1326 (E.D. Wis.

---

<sup>2</sup>See *Board of Educ. v. McCluskey*, 458 U.S. 966, 969-70 (1982); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

<sup>3</sup>*Wood v. Strickland*, 420 U.S. 308, 325 (1975).

<sup>4</sup>The student must allege "particular circumstances suggesting that gender bias was a motivating factor" behind the erroneous disciplinary decision. *Yusuf*, 35 F.3d at 715.

<sup>5</sup>The Title IX plaintiff must demonstrate that "the school district responded to sexual harassment claims differently based on sex," such as showing that the district turned a "blind eye" to assaults on girls but not assaults on boys. *Rowinsky*, 80 F.3d at 1016.

1993), *aff'd*, 32 F.3d 570 (7th Cir. 1994)<sup>6</sup>; see also *Pfeiffer v. School Bd. for Marion Center Area*, 917 F.2d 779, 785-86 (3d Cir. 1990).<sup>7</sup>

The Title IX plaintiff must show that, *but for her gender*, the school's disciplinary response would have been different. Absent evidence of intentional discrimination based on gender, the judicial inquiry under Title IX must end.

The missing ingredient in Petitioner's argument is *any* indication that the school officials actually were motivated by discriminatory animus--that their alleged failure to respond was not merely negligent or senseless but was *discriminatory*. Title IX's protections arise only when gender is the motive behind a discriminatory act.<sup>8</sup> For example, in the Second Circuit case *Yusuf*

---

<sup>6</sup>"There is no support ... to justify a finding that the university defendants would have acted differently if a female, rather than a male, were charged with misconduct... A careful examination of the plaintiff's pleadings fails to disclose any suggestion that her complaints ... were intentionally mishandled because of either party's gender." *Ruh*, 816 F.Supp. at 1331.

<sup>7</sup>In analyzing whether punishment of a female student for premarital sex violated Title IX, the court of appeals held that the district court erred in excluding testimony regarding the discipline of a similarly situated male student. *Pfeiffer*, 917 F.2d at 785-786.

<sup>8</sup>See *Yusuf*, 35 F.3d at 715; *Rowinsky*, 80 F.3d at 1016.

*v. Vassar College*, 35 F.3d 709 (2d Cir. 1994), a male student alleged that his college imposed a stiffer penalty for male-to-female "sexual harassment" than it did for male-on-male physical assault. The court held that the student stated a Title IX claim because, assuming the truth of his allegations, his gender had affected the punishment he received. The court held that a student must allege specific facts raising an inference that gender bias was a motivating factor, such as "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Id.*

The Tenth Circuit employed a similar analysis in *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), in which a male football player was subjected to an offensive hazing incident by other male football players. Football season was cancelled, which increased student hostility toward the student. He filed suit, complaining about the district's response to the alleged "hostile environment." The court of appeals rejected the student's claim because he failed to show that the school officials' conduct was based on his gender. The court noted that the student did not allege



that the school district would have acted differently "if a similar event had occurred in the women's athletic program."

The Petitioner's damages theory must be rejected because it eliminates the statutory requirement of actual discrimination by the grant recipient. Intent to discriminate is an essential element of this claim in two respects. First, proof of gender discrimination is necessary to prevent Title IX from usurping the traditional authority of school officials to manage the public schools. Congress did not mean for Title IX "to impair the independence" of schools in disciplining students. *Yusuf*, 35 F.3d at 715. Second, damages are not available under Title IX except in those instances involving intentional discrimination. See *Franklin v. Gwinnett County Public Schs.*, 503 U.S. 60, 74-75 (1992).

**B. If Petitioner's Argument Prevails, It Will Be Tantamount To Creating a Minimum Disciplinary Code to Avoid Sexual Harassment Liability.**

School discipline rules ultimately serve both a pedagogical and disciplinary function. Unlike adults in the workplace, juveniles have limited life experiences or familial influences upon which to

establish an understanding of appropriate behavior. The real world of school discipline is a rough-and-tumble place where students practice newly learned vulgarities, erupt with anger, tease and embarrass each other, share offensive notes, flirt, push and shove in the halls, grab and offend. In a special education program, student misbehavior could include a Tourette's Syndrome student's uttering continuous obscenities or an autistic student's sexually stimulating herself in the presence of other students. Confronted daily with a dizzying array of immature or uncontrollable behaviors by students, school officials must ferret out the false or trivial allegations from those that are true and serious.

Even when it is clear that a student has violated school rules, there are no federal sentencing guidelines for student discipline decisions--nor should there be. School officials necessarily must use their professional judgment and discretion in responding to complaints about student misconduct. They consider the student's age, history, and other factors. Such school officials usually employ progressive discipline, beginning with verbal directives, telephone calls to parents, after-school detention, class reassignment, short-

term suspension, and banishment from extracurricular activities and ending with expulsion or assignment to an alternative campus, if permitted by state law.

History shows that, no matter what a school official chooses to do, someone will be unhappy. Student offenders almost always view their punishment as too strict,<sup>9</sup> and student complainants almost always view an offender's punishment as too lax.<sup>10</sup> For example, in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), this Court considered the claim of a student who argued that his school had no right to discipline him for using sexual vulgarities. In contrast, the female student in the recent case *Fowler v. Bryan Independent School District*, 1998 Westlaw 350488 (Tex. App.--Houston [1st Dist.], July 2, 1998), had the opposite complaint: she

---

<sup>9</sup>See, e.g., *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 679 (1986) (student alleged that punishment for use of sexual vulgarities was too harsh and violated his free speech rights); *McCluskey*, 458 U.S. at 967 (students complained about mandatory suspension rule); *Palmer v. Merluzzi*, 868 F.2d 90 (3rd Cir. 1989) (student complained that 60-day athletic suspension, in addition to 10-day academic suspension, was excessive).

<sup>10</sup>See, e.g., *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d at 1006, 1008-1009 (5th Cir. 1996) (female complainants alleged that suspensions of male students were inadequate).

alleged that school officials did not do enough when other girls in her junior high class called her "virgin" and "vagina." Although the girls who teased her were given detention and although the complainant was reassigned to a new class and never reported further teasing, the complainant still filed a discrimination lawsuit against her school district.

Petitioner's support for her proposal is based in part on the Sexual Harassment Guidance recently adopted by the Office for Civil Rights. See Department of Education, Office for Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12034 at 12039 & 12042 (March 17, 1997) [hereinafter OCR Guidance]. Under the OCR Guidance, a "hostile environment" will exist if there are a "series of incidents"--even if they do not involve the same student and even if none of the separate incidents is serious. See 62 Fed. Reg. 12039, 12042. Under this theory, random acts of misconduct at different grade levels and different students supervised by different teachers may render the district liable in damages for a "hostile environment." A student also may state a claim even if she was not the target of the offending conduct or if she was subjected to a single



act of offensive touching. 62 Fed. Reg. at 12041. These examples are highly problematic. First, they *presume* that the mere existence of a "series" of misconduct incidents actually violates Title IX. Even the best schools have discipline problems, and it would distort the language and purpose of Title IX to hold schools financially responsible for the occurrence of such incidents. Second, these types of scenarios fail to satisfy this Court's "demanding" standard of actionable conduct even under Title VII, which is aimed at "extreme" conduct.<sup>11</sup> Third, damages are not allowed Title IX under *Franklin* unless there is proof of *intentional discrimination* by the grant recipient. The existence of a "series of incidents" does not establish this intent.

It bears stating the obvious: school officials have *no* incentive to tolerate misconduct in the schools. Student misconduct is not economically or professionally rewarding for teachers, and it does not improve test scores or help pass bond elections to build new schools. Fortunately, Title IX does not require that the federal courts take over the responsibility of managing student discipline in

---

<sup>11</sup> *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2283-94 (1998).

the public schools. Title IX is implicated if, and only if, the student discipline rules are administered in a manner that discriminates on the basis of gender.

**II. Damages are available under Title IX only when program administrators engage in discrimination. Misconduct by teachers and students cannot result in liability.**

**A. School district liability may not be based upon the conduct of employees who lack administrative authority.**

The Petitioner and United States argue that school districts should be held liable in damages when our teachers fail to respond to complaints about student misconduct. The Office for Civil Rights goes so far as to state that schools might be held liable for the decisions of a *cafeteria worker or school bus driver*. See OCR Guidance, 62 Fed. Reg. 12034 at 12039 & 12042. School district liability for damages, however, may not be based upon the conduct of school employees who lack administrative authority. Imposing liability at this level is, in essence, strict liability, which this Court clearly rejected in *Gebser*. The improper decisions of a classroom teacher are no more binding on the school board than were the

harassing acts of the adult molester in *Gebser*. Title IX liability must be tied to conduct that can be fairly characterized as representing the policies or practices of the federal grant recipient (in this case, the school board).

In *Gebser*, the Court was careful to craft a standard that avoided the "risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions." *Gebser*, 118 S.Ct. at 1999.<sup>12</sup> Accordingly, in *Gebser*, the Court focused instead on the knowledge and conduct of the principal who had authority over the teacher. When a school board hires its principals and superintendents, "it makes a deliberate considered judgment about what sort of leadership the district should have...." *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 660 (5th Cir. 1997). This approach "locates the acts of subordinates to the board at a point where the board's liability and practical control are sufficiently close to reflect its intentional discrimination." *Id.*

---

<sup>12</sup> "When the school board accepted federal funds, it agreed not to discriminate on the basis of sex. We think it unlikely that it further agreed to suffer liability whenever its employees discriminate on the basis of sex." *Gebser*, 118 S.Ct. at 1998 (quoting *Rosa H. v. San Elizario Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997)).

at 660. Only when school leaders discriminate can the recipient be said to have violated the terms of the Title IX contract. *Id.* at 659-60.

This Court's precedents show that the proper focus in a Title IX (or Title VI) damages case is the institutional policies or practices of the grant recipient, not the isolated acts of individual employees. *See, e.g., Gebser*, 118 S.Ct. at 2000 (holding that the molester's knowledge of his own wrongdoing could not be imputed to the school district); *Guardians Ass'n v. Civil Service Comm. of New York*, 463 U.S. 582, 597 (1983) (White, J.) (questioning whether the grantee was aware that it was "administering the program in violation of the statute" and whether the plaintiff "has been intentionally discriminated against by the administrators of the program") (emphasis added); *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979) (admissions policy case; Congress wanted to avoid supporting "discriminatory practices"); *see also Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 64 & n. 3 (1992) (school administrators discouraged student from pursuing discrimination charge under Title IX); Comments of Rep. Mink, 117 Cong. Rec.



39252 (1971) ("Any college or university which has [a] ... *policy* which discriminates against women applicants...is free to do so" but should not ask taxpayers to support it) (emphasis added).

The statute and regulations support the conclusion that liability is limited to discriminatory decisions by program administrators. Title IX states that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any education program or activity* receiving federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). A "program or activity" refers to the "operations" of the "local educational agency." 20 U.S.C. § 1687. The phrase "local educational agency," in turn, is defined according to 20 U.S.C. § 8801. Section 8801(18) defines "local educational agency" as a "public board of education" or other "public authority" that has been given legal authority *by the state* for "administrative control or direction of" school services. *See also* 34 C.F.R. § 106.2(h) (1989) (defining "recipient" as any state or local political subdivision). School boards, superintendents, and principals have "administrative

control or direction of" school services. Teachers, bus drivers, and cafeteria workers do not.

In *Gebser*, the Court examined the administrative enforcement component of Title IX in 20 U.S.C. § 1682 to determine when recipients are on "notice" of a violation. *See Gebser*, 118 S.Ct. at 1999. Section 1682 states that the Department of Education must give notice of the violation to an "appropriate person" at the school district. The Court generally defined "appropriate person" as an "official of the recipient entity with authority" to stop the discrimination. *Id.* In the enforcement setting, the phrase "appropriate person" almost always refers to an official who has been handed actual administrative responsibilities by the grant recipient. When OCR wishes to notify a school district about a violation and the possibility of loss of federal funds, OCR invariably notifies the *superintendent*--not a fifth-grade teacher--about the entity's procedural and hearing rights under 34 C.F.R. § 106.71, 34 C.F.R. § 100.8, and 34 C.F.R. § 101.1 *et seq.* The risk of damages--like the cutting off of federal funding--cannot occur absent notice to a program administrator.

**B. Agency theory and the identity of the "discriminator" are relevant.**

The Petitioner and the United States erroneously argue that *Gebser* stands for the proposition that the identity of the "discriminator" is completely irrelevant and that the standard for damages is the same, regardless of whether the perpetrator is a student or a teacher. They confuse two separate questions: (i) whether a Title IX violation has even occurred and (ii) whether the school district may be held liable in damages for that violation. The "proper analysis" recognizes "the separate character of the inquiry into the question of municipal responsibility" and the question of whether a violation has occurred. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 114, 122 (1992).<sup>13</sup>

*Gebser* focused on the second inquiry. This lawsuit is predominantly about the *first* inquiry--whether a violation even occurred. While "agency" theory does not answer the second

---

<sup>13</sup> In *Collins*, the Court described the inquiry under 42 U.S.C. § 1983 as follows: "(1) whether Plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." 503 U.S. at 122.

inquiry, it helps answer the first inquiry. A school district can act only through its agents. The United States impliedly concedes this point when it argues that this lawsuit is not about a boy harassing a girl but, rather, is about the alleged failure of school officials--the district's agents--to stop the harassment.<sup>14</sup>

The identity of the "discriminator" is essential for defining the underlying violation--for defining the misconduct that needs remedying by the recipient. In *Franklin* and *Gebser*, the "agent" was the molesting school teacher. In the case at hand, the relevant "agents" are the school employees who allegedly failed to help LaShonda. It is *their* conduct--not the conduct of non-agents--that defines the potential violation. Only after establishing that an agent committed a violation does the Court proceed to the second inquiry--whether the entity may be held liable in damages for that violation.

This Court and the circuit courts have shown a reluctance in other contexts to hold public entities liable for the acts of non-

---

<sup>14</sup> The distinction is important in yet another respect. While a school district has real control over the "quality" of its workforce, it has no control over the "quality" of its student body. Most public schools are open enrollment institutions.



agents, even in cases of murder, rape, or assault.<sup>15</sup> An illustrative case is this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1988), in which a state social worker negligently placed a boy with his abusive father, who battered the child nearly to the point of death. In rejecting the plaintiff's claim, the Court observed:

Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation. *But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State ..., but by Joshua's father.*<sup>16</sup>

The same can be said about this case: the harm was inflicted by other students, not school officials. Although *DeShaney* was brought under 42 U.S.C. § 1983 and not Title IX, it vividly demonstrates the principle that emotion cannot play a role in the

---

<sup>15</sup>See, e.g., *Graham v. Independent Sch. Dist. No. 1-89*, 22 F.3d 991 (10th Cir. 1994) (rejecting claim of parent of student murdered by another student known to be violent); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) (rejecting claim of mentally retarded student who was raped in the showers by another student); *D.R. by L.R. v. Middlebucks Area Vocational Sch.*, 972 F.2d 1364, 1369 (3d Cir. 1992) (*en banc*) (rejecting claim of students who were molested by other students in classroom darkroom), *cert. denied*, 506 U.S. 1079 (1993).

<sup>16</sup>*Id.* at 202-03.

interpretation of federal law.

The Petitioner observes that certain regulations under Title IX hold grant recipients responsible for the acts of non-recipients. (Pet. Brief at 19.) The regulations in question apply to business transactions and relationships. See, e.g., 34 C.F.R. § 106.32(c)(2), § 106.38. Such regulations merely echo this Court's admonishments that entities cannot avoid liability by *delegating* discriminatory programs to third parties.<sup>17</sup> They do not support a broad "environmental" cause of action based on student misconduct.

**III. Congress did not intend to jeopardize school district funds in the absence of discriminatory conduct attributable to the recipient of the federal funds.**

When a school accepts federal aid, it "weighs the benefits and burdens before accepting the funds." *Guardians Ass'n v. Civil Service Comm'n of N.Y.*, 463 U.S. 582, 596 (1983). If one of the "burdens" of accepting the funds is to guarantee that no student will ever behave badly toward another student, many school districts will

---

<sup>17</sup>*City of Los Angeles v. Manhart*, 435 U.S. 702, 718 n. 33 (1978). In *Manhart*, the Court recognized that Title VII "primarily govern[s] relations between employees and their employer, not between employees and third parties." *Id.*

simply reject federal money and attempt to make up the difference with an increase in local property taxes or other revenues sources. Surely Congress did not intend to *discourage* schools from accepting federal aid. Cf. *id.* 603 n. 24 (the "salutary deterrent effect of a compensatory remedy" may be "outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs").

In *Gebser*, this Court recognized that Congress did not intend to subject public schools to open-ended damages liability for acts of teacher-on-student sexual harassment. The financial impact is even *greater* in the student-on-student misconduct context. First, schools have more students than employees (nationally, students outnumber teachers by 17 to 1).<sup>18</sup> Second, on a daily basis, students are more likely to misbehave than adults. The potential number of

---

<sup>18</sup>For example, the Houston Independent School District in Houston, Texas, enrolls approximately 206,700 students and employs approximately 11,000 teachers. See Texas Education Agency, Division of Performance Reporting, *Snapshot '96: 1995-96 School District Profiles*, pp. 170-174. Nationally, the public schools enroll approximately 45 million children, and the pupil-teacher ratio is 17 students per teacher. See *The Mini-Digest of Education Statistics* [available on-line at <http://nces.ed.gov/NCES/pubs98/MiniDigest97/98020-3.html>].

wrongdoers--and claims--is staggering.<sup>19</sup> Although one obviously cannot predict future claims, we do know that, in 1992, there were no reported Title IX cases on student-on-student misconduct and that, today, there is a bumper crop of them. See *Davis v. Monroe County Board of Educ.*, 120 F.3d 1380, 1394 (11th Cir. 1997) (citing cases as of August 1997). The damages sought by LaShonda in this case--\$500,000--would exceed the annual federal funding of a large number of school districts.<sup>20</sup>

School funds must be reserved for the education of children. Congress did not intend to jeopardize school district funds in the absence of discriminatory conduct attributable to the recipient of the federal funds. When large damages verdicts are awarded against a

---

<sup>19</sup>The risk of increased litigation is further enhanced by the recent decision regarding same-sex harassment in *Oncale v. Sundowner*, 118 S.Ct. 998 (1998). After *Oncale*, all types of student discipline issues will be litigated under the guise of an alleged Title IX violation, regardless of the genders of the students involved.

<sup>20</sup>Nationally, total federal revenues as a percentage of all revenues for all public schools is 6.8 percent. *The Mini-Digest of Education Statistics 1995* [available on-line at <http://nces.ed.gov/NCES/pubs98/MiniDigest97/98020-5.html>]. The school district in *Gebser* received about \$120,000 in federal funds. See Texas Education Agency, *supra* note 20, at 314-318. According to figures supplied by the Monroe County school district, it received approximately \$679,000 in federal aid in 1992-93.



school district, "everyone but a random plaintiff loses." *Leija v. Canutillo Indep. Sch. Dist.*, 887 F.Supp. 947 (W.D. Tex. 1994), *rev'd*, 101 F.3d 393 (5th Cir. 1996).

**IV. During 1992-93, school districts were not on notice that Title IX governed the issue of student-on-student misconduct. There were no federal guidelines on sexual harassment of students until 1996.**

Both the Petitioner and the United States suggest that the Department of Education has had a "longstanding" position concerning liability for sexual harassment and that school districts in 1992-93 knew about this potential liability. The *Amici*, who collectively represent thousands of schools and school leaders in this nation, strongly dispute this contention. The first reported case involving student-on-student misconduct under Title IX did not appear until August 30, 1993.<sup>21</sup> Even after that case and a subsequent decision that rejected Title IX liability,<sup>22</sup> the Department

---

<sup>21</sup> *Doe v. Petaluma City Sch. Dist.*, 830 F.Supp. 1560, 1573 (N.D. Cal. 1993), *reconsidered and revised*, 949 F.Supp. 1415 (N.D. Cal. 1996).

<sup>22</sup> See, e.g., *Garza v. Galena Park Indep. Sch. Dist.*, 914 F.Supp. 1437 (S.D. Tex. 1994).

of Education waited another three years before preparing any policy guidance, which the Department finally distributed to the *Amici* and other interested parties in August 1996. See Office for Civil Rights, Sexual Harassment Guidance, 61 Fed. Reg. 42728 (Aug. 14, 1996).

Although the issue of "notice" is addressed in the Brief of Respondent, the *Amici* write to underscore the fact that the Government's interpretation of Title IX is a new one that, if adopted by this Court, would constitute a substantive change in the law.

**V. School districts have responded to recent concerns about student misconduct and harassment by adopting policies and providing training to staff and students.**

School districts have not turned a blind eye to concerns about student-on-student misconduct. To the contrary, they have responded to the challenge of harassment in the schools with a wide variety of policies, programs, and training materials and videotapes designed to help school employees with the prevention and investigation of harassment allegations. Seminars and age-appropriate materials for students also are now widely available. Such programs and materials were unheard of 10 years ago.

The National School Boards Association's manual on the

prevention of sexual harassment by school employees, entitled *Sexual Harassment in the Schools: Preventing and Defending Against Claims*, was published in 1993. This year, NSBA published *Student-to-Student Sexual Harassment: A Legal Guide for Schools*, its first manual on the prevention of student harassment claims. NSBA also recently collaborated with the National Women's Law Center on the monograph *Righting the Wrongs: A Legal Guide to Understanding, Addressing, and Preventing Sexual Harassment in the Schools*. These monographs contain model policies and provide practical advice for the prevention and investigation of complaints.

Most school districts have adopted policies and procedures similar to those made available by the National Education Policy Network. These sample policies, an example attached hereto as Appendix A, form the basis of many school board resolutions across the United States. Notwithstanding the adoption of these strong policies, school districts in the future will continue to face incidents of student misconduct and, in some instances, those instances may be inadequately addressed. For the reasons previously discussed, however, Title IX liability is inappropriate and unwarranted.

Limiting school district liability for claims based on student misconduct is not an invitation to the nation's school authorities to ignore discipline problems. School districts that have a practice of discriminating against students may be investigated by the OCR, may lose their federal funding, may be directed to make changes in their procedures or policies, and may be sued for damages when intentional discrimination by school authorities is established. Students also may file criminal charges or lawsuits directly against their student perpetrators' parents. Expansion of Title IX is neither mandated nor warranted. Rather than eliminate student misconduct, Petitioner's standard will divert money away from the programs and efforts designed to help schools tackle this issue.



## CONCLUSION

The judgment of the court of appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

*Julie Underwood*  
National School Boards  
Association  
1680 Duke Street  
Alexandria, Va. 22314  
(703) 838 6710

*Lisa A. Brown\**  
*Jennifer Jacobs*  
Bracewell & Patterson, L.L.P.  
711 Louisiana, Suite 2900  
Houston, Texas 77002-2781  
(713) 223-2900

*\*Counsel of record*

*Attorneys for Amicis Curiae*  
*National School Boards Association*  
*National Association of Secondary School Principals*  
*American Association of School Administrators*  
*Georgia School Boards Association*

## APPENDIX A SAMPLE SCHOOL NONDISCRIMINATION POLICY

## NONDISCRIMINATION ON THE BASIS OF SEX

All persons associated with the district community including, but not limited to, the Board, the administration, the staff, and the students are expected to conduct themselves at all times so as to provide an atmosphere free from sexual harassment. Any person who engages in sexual harassment while acting as a member of the school community will be in violation of this policy. All matters involving sexual harassment complaints will remain confidential to the extent possible.

**Definition of Sexual Harassment:** Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature may constitute sexual harassment where:

- Submission to such conduct is made either explicitly or implicitly a term or condition of a person's employment or participation in an educational function, or



- Submission to or rejection of such conduct by an individual is used as the basis for employment or decisions affecting such individual's education, or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work or educational performance or creating an intimidating, hostile, or offensive working or educational environment.

**The Hearing Officer:** The director of employee and student relations of the district will serve as the harassment hearing officer vested with the authority and responsibility of processing all sexual harassment complaints in accordance with the procedure set out below.

**Procedure:**

- Any member of the district community who believes that he/she has been subjected to sexual harassment is to report the incident(s) to any district administrator. The administrator is to contact the hearing officer.
- The hearing officer will attempt to resolve the problem in an informal manner through the following process:

- The hearing officer will confer with the charging party in order to obtain a clear understanding of that party's statement of the facts.
- The hearing officer will attempt to meet with the charged party in order to obtain his or her response to the complaint.
- The hearing officer may hold as many meetings with the parties or gather whatever additional evidence as is deemed necessary.
- On the basis of the hearing officer's perception of the situation, he or she may:
  - attempt to resolve the matter informally through conciliation; or
  - report the incident and transfer the record to the Board or its designee, and so notify the parties by certified mail.

NOV 16 1996

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1998

AURELIA DAVIS, as next friend of LaSHONDA D.,

*Petitioner,*

—v.—

MONROE COUNTY BOARD OF EDUCATION, *et al.*,

*Respondents.*

ON WRIT OF *CERTIORARI* TO THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL  
LIBERTIES UNION AND THE ACLU OF GEORGIA  
IN SUPPORT OF PETITIONER**

Sara L. Mandelbaum  
(*Counsel of Record*)  
Karen R. Marks  
Steven R. Shapiro  
American Civil Liberties Union  
Foundation  
125 Broad Street  
New York, New York 10004  
(212) 549-2500

2588



## TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICI</i> .....	1
STATEMENT OF THE CASE .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	4
I. SECTION 5 OF THE FOURTEENTH AMENDMENT PROVIDES AN INDE- PENDENT SOURCE OF CONSTITU- TIONAL AUTHORITY FOR TITLE IX ....	4
A. Congress May, And Often Does, Act Pursuant To More Than One Source Of Constitutional Authority When Adopting Legislation .....	5
B. The Purposes And Remedial Structure Of Title IX Are Fully Consistent With The Broad Antidiscrimination Goals Of Section 5 And The Equal Protec- tion Clause .....	8
C. The Legislative History Of Title IX Reinforces The Conclusion That Con- gress Was Acting Pursuant To Section 5 .....	10
II. THIS COURT HAS NEVER REQUIRED ANTIDISCRIMINATION LAWS EN- ACTED PURSUANT TO SECTION 5 TO DETAIL EVERY FORM OF PROHIB- ITED DISCRIMINATION .....	14
CONCLUSION .....	20

## TABLE OF AUTHORITIES

Cases	<i>Page</i>
<i>Atascadero State Hosp. v. Scanlon</i> , 473 U.S. 234 (1985) .....	13
<i>Bundy v. Jackson</i> , 641 F.2d 934 (D.C. Cir. 1981) .....	16
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979) .....	9, 10, 12, 18
<i>Cariddi v. Kansas City Chiefs Football Club</i> , 568 F.2d 87 (8th Cir. 1977) .....	16
<i>City of Boerne v. Flores</i> , 521 U.S. ___, 117 S.Ct. 2157 (1997) .....	7, 9, 14
<i>Compston v. Borden, Inc.</i> , 424 F.Supp. 157 (S.D. Ohio 1976) .....	16
<i>Crawford v. Davis</i> , 109 F.3d 1281 (8th Cir. 1997) .....	6, 7, 10
<i>Doe v. University of Illinois</i> , 138 F.3d 653 (7th Cir.) .....	7, 10
<i>EEOC v. Elrod</i> , 674 F.2d 601 (7th Cir. 1982) .....	6
<i>EEOC v. Wyoming</i> , 460 U.S. 226 (1983) .....	6
<i>Ex parte Virginia</i> , 100 U.S. 339 (1879) .....	9
<i>Firefighters Institute for Racial Equality v. St. Louis</i> , 549 F.2d 506 (8th Cir.), <i>cert. denied</i> , 434 U.S. 819 (1977) .....	16

	<i>Page</i>
<i>Fitzpatrick v. Bitzer</i> , 427 U.S. 445 (1976) .....	13
<i>Franklin v. Gwinnett County Pub. School</i> , 503 U.S. 60 (1979) .....	9, 10
<i>Franks v. Kentucky School for the Deaf</i> , 142 F.3d 360 (6th Cir. 1998) .....	7
<i>Gebser v. Lago Vista Indep. School Dist.</i> , 524 U.S. ___, 118 S.Ct. 1989 (1998) .....	3, 10, 18, 19
<i>Gray v. Greyhound Lines, East</i> , 545 F.2d 169 (D.C.Cir. 1976) .....	16
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) .....	17
<i>Harris v. Forklift Systems, Inc.</i> , 510 U.S. 17 (1993) .....	15, 19
<i>Heart of Atlanta, Inc. v. United States</i> , 379 U.S. 241 (1964) .....	5, 6
<i>Henson v. Dundee</i> , 682 F.2d 897 (11th Cir. 1982) .....	16
<i>Katz v. Dole</i> , 709 F.2d 251 (4th Cir. 1983) .....	16
<i>Los Angeles Dep't of Water and Power v. Manhart</i> , 435 U.S. 702 (1978) .....	15
<i>Meritor Savings Bank, FSB v. Vinson</i> , 477 U.S. 57 (1986) .....	14, 15, 16, 18, 19
<i>Mississippi Univ. for Women v. Hogan</i> , 458 U.S. 718 (1982) .....	8



	<i>Page</i>
<i>North Haven Bd. of Educ. v. Bell</i> , 456 U.S. 512 (1982) .....	18
<i>Pennhurst State School and Hospital v. Halderman</i> , 451 U.S. 1 (1981) .....	11, 17
<i>Reed v. Reed</i> , 404 U.S. 71 (1971) .....	8
<i>Rogers v. EEOC</i> , 454 F.2d 234 (5th Cir. 1971) .....	15, 16
<i>Rowinsky v. Bryan Indep. School Dist.</i> , 80 F.3d 1006 (5th Cir.), <i>cert. denied</i> , ___ U.S. ___, 117 S.Ct. 165 (1996) .....	7
<i>Seminole Tribe of Florida v. Florida</i> , 517 U.S. 44 (1996) .....	10
<i>United States v. Price</i> , 383 U.S. 787 (1966) .....	18
<i>United States v. Virginia</i> , 518 U.S. 515 (1996) .....	8
<i>Zabkowicz v. West Bend Co.</i> , 589 F.Supp. 780 (E.D.Wis. 1984) .....	16
 <b>Statutes and Regulations</b>	
Age Discrimination in Employment Act, 29 U.S.C. §§621-624 (1967) .....	6
Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988 .....	11, 12, 13

	<i>Page</i>
Civil Rights Remedies Equalization Act Amendment, 42 U.S.C. §2000d-7 (1994) .....	10, 12, 13
Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§6000-6083 .....	11
Education Amendments of 1972 (Title IX), Pub.L.No. 92-318, 86 Stat. 235 (1972)(codified as amended at 20 U.S.C. §§1681-1688 (1994) .....	<i>passim</i>
62 Fed.Reg. 12034 (1997) .....	15
 <b>Legislative History</b>	
"Discrimination Against Women: Hearings on Section 805 of H.R. 16098 before the Special Committee on Education of the House Committee on Education and Labor," 91st Cong., 2d Sess. (1970) .....	11
118 Cong.Rec. 5803 (1972) .....	10
122 Cong.Rec. 31472 (1976) .....	12
131 Cong.Rec. 22 (1985) .....	12
132 Cong.Rec. 28 (1986) .....	13
S.Rep.No. 1011, 94th Cong., 2d Sess., <i>reprinted in</i> 1976 U.S. Code Cong. & Admin. News 5913 .....	11

### INTEREST OF *AMICI*<sup>1</sup>

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Georgia is one of its statewide affiliates. In 1971, the ACLU established its Women's Rights Project, which has been at the forefront of the battle for women's equality in schools and elsewhere for the past three decades. The proper interpretation of Title IX is therefore a matter of great concern to the ACLU and its members. The ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

### STATEMENT OF THE CASE

LaShonda Davis was in the fifth grade at Hubbard Elementary School when she first complained to her teachers that the classmate assigned to the seat next to her was sexually harassing her. The harassment took various forms, including offensive language, fondling, and sexual abuse, and recurred repeatedly over the course of five months. On numerous occasions, LaShonda and her mother, Aurelia Davis, reported the conduct to her teachers and to the school principal. Despite her repeated calls for intervention, school officials provided LaShonda with no protection other than granting her request for a different seat assignment -- and

---

<sup>1</sup> Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.



even that minimal action was not taken until LaShonda had complained of the student's harmful conduct for three months. After the school failed to discipline the student who harassed LaShonda, despite the increasingly harmful effects of the conduct on LaShonda, Mrs. Davis finally reported the conduct to the Sheriff's office. The harassing student was ultimately charged with sexual battery, a charge which he did not deny.

Petitioner then brought an action alleging that the school board and two school officials had violated section 901 of the Education Amendments of 1972, Pub.L.No. 92-318, 86 Stat. 235, 373 (1972)(codified as amended at 20 U.S.C. §§1681-1688 (1994))("Title IX"), and 42 U.S.C. §1983, by failing to prevent the sexual harassment.

The district court granted defendants' motion to dismiss for failure to state a claim upon which relief could be granted. *Aurelia D. v. Monroe County Bd. of Educ.*, 862 F. Supp. 363, 368 (M.D.Ga. 1994). On appeal, a panel of the Eleventh Circuit reinstated petitioner's Title IX claim, holding that Title IX embraces claims of peer harassment in school, just as Title VII embraces claims of peer harassment in the workplace. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1193-95 (11th Cir. 1996). The panel decision was then reversed by the Eleventh Circuit *en banc*. The *en banc* court justified its narrow construction of the statute by noting that Title IX was passed under the Spending Clause, without considering whether Congress also had enacted Title IX pursuant to Section 5 of the Fourteenth Amendment. 120 F.3d 1390, 1397 (11th Cir. 1997).

### SUMMARY OF ARGUMENT

The Eleventh Circuit's narrow construction of Title IX rests squarely on its holding that Congress enacted Title IX pursuant to its Spending Clause powers. As petitioner's

brief demonstrates, the Eleventh Circuit's reasoning is flawed even on its own terms.

This brief addresses a separate but equally fundamental error: while we agree that Title IX was enacted pursuant to the Spending Clause, we do not believe that the Spending Clause provided the *only* source of constitutional authority. Contrary to the court below, we believe it is clear from the text and legislative history that Title IX was also adopted pursuant to Section 5 of the Fourteenth Amendment, which grants Congress broad powers to enforce the Equal Protection Clause.

The unambiguous purpose of Title IX is to prohibit sex discrimination in federally funded education programs. It was enacted in response to what Congress perceived as a pervasive and ongoing problem in schools across the country. As a device for ensuring compliance with its remedial mandates, Title IX conditions the continued receipt of federal education funds on a school's agreement not to discriminate on the basis of sex.

Title IX uses monetary sanctions as a lever to protect substantive rights. While no doubt derived in part from Congress' power under the Spending Clause of Article I, Title IX simultaneously draws from Congress' power to enforce the substantive guarantees of the Equal Protection Clause of the Fourteenth Amendment. Both at the time Title IX was first passed, as well as in subsequent amendments, Congress left little doubt that its object in enacting Title IX was to secure equal protection for women in the educational process.

Given Title IX's remedial goals, it can and should be interpreted using the same principles of statutory construction that the Court has applied to other Section 5 legislation. Specifically, it is important to distinguish between knowledge of the facts and knowledge of the law. After *Gebser*

*v. Lago Vista Indep. School Dist.*, 524 U.S. \_\_\_, 118 S.Ct. 1989 (1998), it may be necessary to prove that defendants had actual knowledge that particular discriminatory acts occurred before they can be held liable for damages. But it does not follow that when, as here, defendants were fully aware of the underlying conduct, they can escape liability by claiming ignorance that the conduct was prohibited under law.

This Court has never required Congress to spell out every form that discrimination might take when it enacts a civil rights statute. Moreover, any such holding would seriously eviscerate Congress' broad remedial powers under Section 5. Consistent with that principle, *amici* respectfully submit that the Eleventh Circuit's holding that student-to-student sexual harassment claims are never actionable under Title IX cannot be sustained. To the contrary, such claims fit easily within the broad prohibitory language of Title IX.

## ARGUMENT

### I. SECTION 5 OF THE FOURTEENTH AMENDMENT PROVIDES AN INDEPENDENT SOURCE OF CONSTITUTIONAL AUTHORITY FOR TITLE IX

In resolving this case in favor of the school board, the Eleventh Circuit held (based on a discussion contained entirely in a single footnote) that Congress enacted Title IX solely pursuant to its authority under the Spending Clause. Beginning with that premise, the Eleventh Circuit then applied contract law principles to the interpretation of Title IX and concluded that student-to-student harassment is not prohibited by the statute, notwithstanding its broadly worded ban against sexual discrimination in federally funded education programs.

Largely for reasons set forth in petitioner's brief, *amici* believe that the decision below must be reversed even under current Spending Clause jurisprudence. *Amici* also believe, however, that the Eleventh Circuit erred in failing to recognize that Section 5 of the Fourteenth Amendment provides an independent source of constitutional authority for Title IX. The purpose, scope, and legislative history of Title IX make it clear, in our view, that Congress saw Title IX as more than a condition on federal funding; it saw it as a means of enforcing the core principles of equality embodied in the Equal Protection Clause.

#### A. Congress May, And Often Does, Act Pursuant To More Than One Source Of Constitutional Authority When Adopting Legislation

The Eleventh Circuit appeared to assume that it was under some obligation to choose between the Spending Clause and Section 5 as the proper constitutional basis for Title IX. Nothing in the Constitution or this Court's cases, however, requires that choice. To the contrary, the notion that a particular congressional statute may rest on more than one source of constitutional authority is hardly a novel one, especially in the civil rights context.

For example, this Court's decision upholding the constitutionality of the 1964 Civil Rights Act in *Heart of Atlanta, Inc. v. United States*, 379 U.S. 241, 249 (1964), expressly noted that "Congress based the Act on Section 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce . . . ." Because of its conclusion that the Commerce Clause provided adequate authority for the public accommodations provisions of the 1964 Act, the majority found it unnecessary to reach the Fourteenth Amendment issues. *Id.* at 279 (Black, J., concurring). But two separate concurrences nonetheless concluded that Congress had properly invoked its Section 5



powers. *Id.* at 280 (Douglas, J., concurring); *id.* at 293 (Goldberg, J., concurring). Of particular note for present purposes, no member of the Court challenged Justice Goldberg's observation that Congress could rely on what he described as "dual" support for its civil rights statutes. *Id.* at 292 n.1.

It is not surprising, therefore, that in rejecting a constitutional challenge to the 1974 amendment to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621-624 (1967), the Seventh Circuit referred to "the familiar pattern of contemporary civil rights acts in grounding prohibitions against private parties in the Commerce Clause, while reaching government conduct by the more direct route of the Fourteenth Amendment." *EEOC v. Elrod*, 674 F.2d 601, 604 (7th Cir. 1982).

Moreover, the question of whether Congress acted pursuant to its Section 5 authority does not depend on a specific reference in the statutory text itself or even in the legislative history. As this Court noted in an analogous context, "Congress need not [have] recite[d] the words '§5' or 'Fourteenth Amendment' or 'equal protection.'" *EEOC v. Wyoming*, 460 U.S. 226, 243-44 n.18 (1983)(holding that because Title VII was enacted pursuant to Section 5 it overrides any Eleventh Amendment claim by the states). Rather, the question is whether Congress, "as an objective matter," *had the constitutional authority* to act pursuant to its power to enforce the Equal Protection Clause. *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997). Here, this standard is easily met because Section 5 of the Fourteenth Amendment grants Congress the authority to enforce the substantive guarantees of the Fourteenth Amendment and Title IX is plainly within the ambit of that enforcement authority.

Applying these principles, the majority of courts to address the question have had little difficulty concluding that

the constitutional roots of Title IX lie in Section 5 of the Fourteenth Amendment as well as the Spending Clause. *See, e.g., Doe v. University of Illinois*, 138 F.3d 653 (7th Cir.), *petition for cert. filed*, 67 U.S.L.W. 3083 (July 13, 1998)(No. 98-126)(prohibiting "arbitrary, discriminatory conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment")(internal citations omitted); *Crawford v. Davis*, 109 F.3d at 1283 ("we are unable to understand how a statute [Title IX] enacted specifically to combat [gender] discrimination could fall outside the authority granted to Congress by Section 5"); *Franks v. Kentucky School for the Deaf*, 142 F.3d 360 (6th Cir. 1998)(same). *But see Rowinsky v. Bryan Indep. School Dist.*, 80 F.3d 1006, 1013 n.14 (5th Cir.), *cert. denied*, — U.S. —, 117 S.Ct. 165 (1996).<sup>2</sup>

---

<sup>2</sup> In rejecting a Section 5 basis for Title IX, the court below merely noted that the prohibitions contained in Title IX extend beyond the state actors reached by the Fourteenth Amendment. *Davis*, 120 F.3d at 1398 n.12. *But see District of Columbia v. Carter*, 409 U.S. 418, 423-24 & n.8 (1973)(that "[t]he Fourteenth Amendment itself 'erects no shield against merely private conduct' . . . is not to say . . . that Congress may not proscribe purely private conduct under Section 5 of the Fourteenth Amendment); *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966)(Section 5 permits Congress to regulate conduct beyond what Section 1 prohibits); *United States v. Guest*, 383 U.S. 745, 762 (1966)(Clark, J., concurring, joined by Black and Fortas, JJ.)(*"there can be no doubt" that Congress can regulate private conduct under Section 5*); *City of Boerne v. Flores*, 521 U.S. —, 117 S.Ct. 2157 (1997), citing with approval prior precedent refusing to limit Congress' Section 5 powers to conduct that violates Section 1, but holding that Section 5 legislation must be designed in part to remedy such discrimination. However, even if enforcement legislation enacted pursuant to Section 5 were bound by a similar state action requirement, the Eleventh Circuit's observation has little relevance to this case, which involves only governmental defendants.

**B. The Purposes And Remedial Structure Of Title IX Are Fully Consistent With The Broad Antidiscrimination Goals Of Section 5 And The Equal Protection Clause**

Title IX guarantees that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits or, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. §1681. Respondents do not and cannot deny that they are covered by the terms of Title IX. It is equally too late in the day to dispute that "neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature -- equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996)(holding that the Equal Protection Clause prohibits a state-funded educational institution from discriminating against students on the basis of their sex absent an "exceedingly persuasive justification"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982)(same); *Reed v. Reed*, 404 U.S. 71 (1971)(holding that sex-based classifications violate the Equal Protection Clause of the Fourteenth Amendment).

Thus, the purposes of Title IX and the purposes of the Equal Protection Clause are entirely congruent, at least in cases like this where Title IX is invoked against public officials operating federally funded programs. In such cases, Title IX is simply one means of enforcing the equality guarantees of the Fourteenth Amendment. Viewed in these terms, it fits comfortably within the scope of congressional authority conferred by Section 5, which this Court has expansively and deferentially construed for more than a century.

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment and perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional powers.

*Ex parte Virginia*, 100 U.S. 339, 345-46 (1879), quoted with approval in *City of Boerne v. Flores*, 117 S.Ct. at 2163.

There is little doubt that Title IX is well "adapted to carry out" the antidiscrimination goals of the Fourteenth Amendment. To be sure, the threat of a federal fund cut-off serves the purposes of the Spending Clause by ensuring that federal money is spent for its intended purposes and not used to promote discrimination. But by discouraging discrimination, the threat of a federal fund cut-off also promotes the purposes of the Equal Protection Clause.

In addition, this Court has recognized that Title IX can be enforced by a private right of action, *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and that an injured plaintiff can recover monetary damages under Title IX, *Franklin v. Gwinnett County Pub. School*, 503 U.S. 60 (1979). Thus, federal funds may be the trigger for Title IX, but the loss of federal funds is not the only remedy. As this Court explained in *Cannon*, the existence of these two remedial alternatives is critical to understanding Title IX.

First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protections against those practices. Both of these purposes were repeatedly identified in the debates . . . ."



441 U.S. at 704. Even if the first purpose could be described as more closely aligned with the Spending Clause, the second purpose just as clearly reflects the antidiscrimination goals of the Fourteenth Amendment.<sup>3</sup>

### C. The Legislative History Of Title IX Reinforces The Conclusion That Congress Was Acting Pursuant To Section 5

Although Congress did not expressly refer to the source of its constitutional authority when enacting Title IX, the legislative record is replete with references to the pervasive discrimination against women in education. In the words of Senator Bayh: "It is clear to me that sex discrimination reaches into all facets of education -- admission, scholarship programs, faculty hiring and promotion, professional staffing and pay scales." 118 Cong.Rec. 5803 (1972). See also

---

<sup>3</sup> Last Term, in *Gebser v. Lago Vista Independent School Dist.*, 118 S.Ct. at 1998, the Court described Title IX as a form of Spending Clause legislation. See also *Franklin*, 503 U.S. 75 n.8 ("[W]e need not decide which power Congress utilized in enacting Title IX"). Neither petitioner nor amici have ever contested that point. But, for reasons stated above, it does not follow that Congress was not also acting pursuant to its Section 5 powers. In fact, insofar as *Gebser* assumed that Congress abrogated the states' Eleventh Amendment immunity in Title IX claims, 118 S.Ct. at 1996, the Court must also have assumed that Title IX was enacted under Section 5. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Indeed, after this Court's decision in *Seminole Tribe*, numerous courts have continued to uphold damages claims against governmental defendants under Title IX based on their understanding that Title IX is a valid exercise of Congress' Section 5 powers. See *Doe*, 138 F.3d at 657 ("Title IX and the Equalization Act (CRREA) read together, unequivocally state Congress' intent to abrogate the States' Eleventh Amendment immunity"); *Crawford*, 109 F.3d at 1283 ("Congress has unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity for Title IX claims").

"Discrimination Against Women: Hearings on Section 805 of H.R. 16098 before the Special Committee on Education of the House Committee on Education and Labor," 91st Cong., 2d Sess. (1970). This concern with discrimination speaks in the language of the Fourteenth Amendment even if the Fourteenth Amendment was not specifically invoked, and should be sufficient at least to create a presumption that Congress was acting pursuant to its Section 5 powers.<sup>4</sup>

Furthermore, it is perfectly clear from the subsequent legislative history that Congress thought it was acting under Section 5 when it adopted Title IX. Thus, only four years later, Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, which provides attorneys' fees to successful civil rights plaintiffs. Section 1988 authorizes the disbursement of attorneys' fees to prevailing parties in actions to enforce a series of civil rights statutes, including Title IX. The legislative history plainly establishes that Congress acted pursuant to the Fourteenth Amendment when enacting §1988:

Fee awards are therefore provided in cases covered by [§1988] in accordance with Congress' power under, *inter alia*, the Fourteenth Amendment, Section 5.

S.Rep.No. 1011 at 5, 94th Cong. 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Admin. News 5913.

---

<sup>4</sup> Nothing in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), undermines the strength of this inference. The question in *Pennhurst* was whether the provisions of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§6000-6083, were enforceable against the states through an implied right of action. The Court held that they were not, in part because of the Court's reluctance to impose new financial obligations on the states that Congress had not expressly authorized. That concern does not apply in this case, however, because the Court has already held that Title IX can be enforced by a private damages action.

Standing alone, §1988 does not create any rights. Instead, §1988 derives its authority from the underlying statutes that it is designed to enforce. In this case, the logical inference is that §1988 and Title IX are both grounded in the Fourteenth Amendment. And, indeed, this Court recognized as much in *Cannon*, when it relied on the legislative history of §1988 to buttress its description of Title IX as part of "the civil rights enforcement scheme" that successive Congresses have enacted over the past 110 years" to "enforce the Fourteenth Amendment by eliminating discrimination." 441 U.S. at 686 n.7, quoting 122 Cong.Rec. 31472 (1976)(remarks of Sen. Kennedy).<sup>5</sup>

Even more persuasively, when Congress strengthened the enforcement mechanisms under Title IX by enacting the Civil Rights Remedies Equalization Act Amendment (CRREA), 42 U.S.C. §2000d-7 (1994), it explicitly invoked its authority under both Section 5 and the Spending Clause. Senator Cranston, who was the legislative sponsor of CRREA, specifically noted:

Congress has the authority to waive the States' Eleventh Amendment immunity under . . . the spending clause and section 5 of the Fourteenth Amendment. [T]his legislation is clearly authorized by [these] two provisions.

131 Cong.Rec. 22, 346 (1985). The Justice Department expressed a similar view in its official statement on CRREA:

Thus, to the extent that the proposed amendment is grounded on congressional powers under section five of the fourteenth amend-

---

<sup>5</sup> Here, as in *Cannon*, the Court would be "remiss if it ignored these authoritative expressions concerning the scope and purposes of Title IX." 441 U.S. at 686 n.7.

ment, S. 1579 makes Congress' intention "unmistakably clear in the language of the statute" to subject states to the jurisdiction of the federal courts.

132 Cong.Rec. 28, 624 (1986)(letter from Assistant Attorney General John R. Bolton to Senator Orrin Hatch).<sup>6</sup>

The legislative history detailing CRREA's enactment is as definitive as the legislative history relied upon by the Court when holding that Title VII was enacted pursuant to Section 5. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457, n.9 (1976)("There is no dispute that in enacting the 1972 Amendments to Title VII . . . Congress exercised its power under Section 5 of the Fourteenth Amendment"). Like §1988, CRREA is a derivative statute, enacted to enforce legislation, including Title IX. The logical inference, again, is that if CRREA was enacted pursuant to both Section 5 and the Spending Clause, then so was Title IX, CRREA's underlying statute.

In short, Congress' intent to implement broad antidiscrimination provisions when enacting Title IX, and to do so pursuant to its authority under Section 5 of the Fourteenth Amendment, is implicit in the legislative history of Title IX and explicit in the legislative history of CRREA and §1988.

---

<sup>6</sup> CRREA was enacted in response to the Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985), which held that Congress must make "unmistakably clear" its intent to abrogate Eleventh Amendment immunity. CRREA therefore specifies that: "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . Title IX of the Education Amendments of 1972 . . . ."



## II. THIS COURT HAS NEVER REQUIRED ANTI-DISCRIMINATION LAWS ENACTED PURSUANT TO SECTION 5 TO DETAIL EVERY FORM OF PROHIBITED DISCRIMINATION

The question of whether or not Title IX prohibits student-to-student harassment is ultimately an issue of statutory interpretation and congressional intent. But the Eleventh Circuit's approach to that question inevitably was affected by its view that Title IX was enacted solely pursuant to the Spending Clause. Even if Congress is required "to give potential recipients unambiguous notice of the conditions they are assuming when they accept federal funding," *Davis*, 120 F.3d at 1399, this Court has never imposed a similarly restrictive rule of statutory construction on Section 5 legislation. To the contrary, the Court has consistently held that antidiscrimination laws enacted under Section 5 should be liberally construed to promote the broad equality principles of the Fourteenth Amendment.

This principle of construction is not a license to Congress to "decree the substance of the Fourteenth Amendment's restrictions on the states." *City of Boerne*, 117 S.Ct. at 2163. But it does suggest that it is particularly inappropriate for courts to elevate form over substance when interpreting the nation's civil rights laws. Obviously, there is a point at which any law becomes so vague that its enforcement offends basic notions of due process. However, that is a far cry from the Eleventh Circuit's conclusion that the sweeping terms employed in a civil rights law such as Title IX must be read to permit every form of discrimination that is not explicitly prohibited.

That is not the approach this Court has ever taken. More to the point, it is not the approach this Court took when it first ruled, in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), that sexual harassment is a form of sex-

ual discrimination under Title VII. Nothing in the language of Title VII referred to sexual harassment, and petitioner strenuously argued that the words of the statute could not be read to bar a hostile work environment absent some evidence that the respondent had suffered tangible economic consequences. This Court unequivocally rejected the restrictive reading that petitioner proposed.

Instead, the Court read the statute in light of its underlying purposes and concluded that "[t]he phrase 'terms, conditions, or privileges or employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.* at 63, citing *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978). Next, the Court pointed to EEOC guidelines specifying that sexual harassment is a form of sex discrimination prohibited by Title VII and that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." 477 U.S. at 65. *Cf.* 62 Fed.Reg. 12034, 12039-40 (1997)(OCR final policy guidance under Title IX prohibiting peer harassment in schools). Relying on both sources of authority, the Court concluded that sexual harassment that rises to the level of a hostile work environment could form the basis of a Title VII violation. *See also Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)("[T]he very fact that discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality").

Both before and after *Meritor*, the lower courts have followed a similar approach in broadly interpreting civil rights laws enacted pursuant to Section 5. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), cited in *Meritor*, 477 U.S. at 65, was the first case to recognize a cause of action based upon a racially discrim-

inatory work environment. In *Rogers*, the Fifth Circuit held that a Hispanic plaintiff could establish a Title VII violation by demonstrating that her employer created a hostile work environment for employees by giving discriminatory service to its Hispanic clientele. *Id.* at 238. The appellate court explained that "Title VII should be accorded a liberal interpretation" and, in accordance with this broad interpretation, held that Title VII's protections extend beyond the economic aspects of employment:

[T]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority groups . . . .

*Id.*

Other lower courts have applied this broad reading of Title VII to harassment based on race, religion, national origin, and discriminatory sexual harassment. *See, e.g., Firefighters Institute for Racial Equality v. St. Louis*, 549 F.2d 506, 514-15 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976)(race); *Compston v. Borden, Inc.*, 424 F.Supp. 157 (S.D. Ohio 1976)(religion); *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977)(national origin); *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982); *Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934, 934-44 (D.C. Cir. 1981); *Zabkowicz v. West Bend Co.*, 589 F.Supp. 780 (E.D. Wis. 1984)(sexual harassment), *cited in Meritor*, 477 U.S. at 66.

In each of these contexts, the fact that Title VII does not mention harassment has not prevented the courts from concluding nonetheless that harassment violates the statute.

Besides recognizing harassment as a form of discrimination covered by Title VII, the Court has found that other discriminatory practices not mentioned in Title VII also are covered by the statute. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), for example, the Court considered whether Title VII covered testing procedures and employment criteria that discriminate on the basis of race. The employer in *Griggs* had instituted policies requiring new hires and transfers at a power generating facility to possess a high school degree and to obtain satisfactory scores on two aptitude tests. Though cognizant that "nothing in the Act preclude[d] the use of the testing or measuring procedures," *id.* at 436, the Court found that the purpose of Title VII, "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees," supported the recognition of a Title VII claim based on the discriminatory impact of ostensibly neutral employment practices.

The principle that Section 5 statutes should be construed liberally is hardly a new or controversial one. When construing "mere federal-state funding statutes" -- *i.e.*, those passed under the spending power that do not create new substantive rights -- the Court has looked to "whether the State voluntarily and knowingly accept[ed] the terms of the 'contract,'" so that it can fairly be said that the State had an opportunity to comply with the federal funding requirement. *Pennhurst*, 451 U.S. at 17, 18.<sup>7</sup> By contrast, when constru-

---

<sup>7</sup> The notion that the source of constitutional authority may be relevant in determining the required level of statutory specificity was central to the Court's holding in *Pennhurst*, 451 U.S. at 17.



ing acts that enforce the substantive rights of the Fourteenth Amendment, the Court has never required the statute to specify that a particular form of discrimination is prohibited as a prerequisite to a statutory violation. As *Meritor* demonstrates, the fact that a remedial statute enacted pursuant to the Fourteenth Amendment does not spell out each form of prohibited discrimination does not immunize that form of discrimination from the statute's reach. Courts look instead to the overall purpose of the statute to determine its substantive scope.

In recognition of the intended purpose of Title IX, the Court has long supported a broad reading of the statute's substantive scope. In *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982), quoting *United States v. Price*, 383 U.S. 787 (1966), the Court instructed that the text of Title IX should be accorded "a sweep as broad as its language." The Court in *Cannon* again supported a broad interpretation of Title IX when it inferred in Title IX a private right of action, though the statute's language does not explicitly authorize one. *Cannon*, 441 U.S. at 694-98; see also *id.*, at 703 ("We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination"). Moreover, for the persuasive reasons petitioner articulates in her brief, recognizing that student-to-student sexual harassment claims fall within Title IX is consistent with Title IX's plain meaning and legislative history. The fact that defendant school officials allowed sexual harassment to flourish, regardless of whether that harassment was perpetrated by a teacher or a student, should therefore subject them to liability under Title IX.

Last Term's decision in *Gebser v. Lago Vista Indep. School Dist.*, 118 S.Ct. 1989, is not to the contrary. The holding of *Gebser* is that a school district cannot be held

liable in damages under Title IX for teacher-student harassment unless it had actual knowledge of the harassment. This case involves a different issue entirely. *Gebser* was concerned with ensuring that defendants have adequate notice of the existence of the discrimination before they are held liable in damages. Defendants undeniably had that notice here. Accordingly, the only issue in this case is whether defendants can claim immunity from damages because Congress did not provide them in advance with a laundry list of every possible discriminatory act that may be actionable under Title IX. Nothing in *Gebser* can plausibly be read to impose that obligation on Congress. More importantly, any such obligation would seriously impede civil rights enforcement and run counter to the well-established rule that civil rights laws should be broadly construed.

The court below reached the wrong result because it followed the wrong interpretive path. By treating Title IX as nothing more than a contract between the federal government and the school districts it funds, the Eleventh Circuit lost sight of Title IX's roots in the Fourteenth Amendment. As a result, it construed Title IX as though it were part of the tax code rather than an important part of this nation's civil rights laws. Under Section 5, the relevant question is not whether Congress mentioned the problem of peer sexual harassment in the text of Title IX or even its legislative history. The relevant question is whether peer sexual harassment can ever rise to the level of discrimination on the basis of sex. The answer to that question is surely yes, as this Court recognized in *Meritor* and *Harris*. Petitioner's complaint was therefore improperly dismissed.

### CONCLUSION

For the reasons stated herein, the judgment of the court below should be reversed.

Respectfully submitted,

Sara L. Mandelbaum  
(*Counsel of Record*)  
Karen R. Marks  
Steven R. Shapiro  
American Civil Liberties Union  
Foundation  
125 Broad Street  
New York, New York 10004  
(212) 549-2500

Dated: November 9, 1998



DEC 8 1998

CLERK

No. 97-843

In the  
**Supreme Court of the United States**

OCTOBER TERM, 1998

AURELIA DAVIS, AS NEXT FRIEND OF LASHONDA D.,  
PETITIONER,

v.

MONROE COUNTY BOARD OF EDUCATION, ET AL.,  
RESPONDENTS.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE  
INDEPENDENT WOMEN'S FORUM  
IN SUPPORT OF THE RESPONDENTS

ANITA K. BLAIR

*General Counsel*

INDEPENDENT WOMEN'S FORUM  
4141 N. Henderson Road  
Arlington, VA 22203  
(703) 558-4991

RICHARD P. WARD\*

*\*Counsel of Record*

PETER L. EBB

JENNIFER C. BRACERAS

ROPES &amp; GRAY

One International Place

Boston, MA 02110

(617) 951-7000

*Counsel for Amicus Curiae*

December, 1998 + +

3688

BRIEF OF *AMICUS CURIAE*  
INDEPENDENT WOMEN'S FORUM  
IN SUPPORT OF THE RESPONDENTS

---

Table of Contents

TABLE OF AUTHORITIES .....	iv
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF THE ARGUMENT .....	1
STATEMENT OF THE CASE .....	2
ARGUMENT .....	2
I. NEITHER THE TEXT OF TITLE IX NOR THE IMPLEMENTING REGULATIONS CONTEMPLATE SCHOOL DISTRICT LIABILITY FOR STUDENTS BEHAVING BADLY .....	2
II. CREATING A FEDERAL CAUSE OF ACTION FOR "PEER HARASSMENT" WILL NOT FURTHER THE PURPOSES OF TITLE IX AND WILL FRUSTRATE THE EDUCATIONAL MISSION OF OUR PUBLIC SCHOOLS .....	5
A. There Is No Principled Basis To Elevate Sexual Misconduct By A Student Above Other Serious Student Misconduct .....	5
B. Out Of Fear Of Being Held Liable For Conduct Beyond Their Control, Schools Will Adopt Draconian Policies Which Limit Basic Rights And Freedoms Of All Students .....	5



C. Allowing Students To Hold Schools Financially Liable For Misconduct By Other Student Will Drain Scarce Resources From <i>All</i> Students. ....	8
D. Schools Already Have Ethical And Legal Obligations To Protect The Students In Their Care .....	11
E. Students Harassed By Classmates Already Posses A Variety of Legal Remedies And Do Not Need Federally Imposed Gender-Politics to Protect Them .....	12
<b>III. ALTHOUGH SCHOOLS MAY BE HELD LIABLE FOR KNOWN TEACHER HARASSMENT, A DIFFERENT STANDARD OF LIABILITY MUST APPLY TO STUDENT MISCONDUCT</b> .....	14
A. This Court's Holding In <i>Gebser</i> Confirms The View That Schools Are Not Liable Under Title IX For The Harassment of One Student By Another .....	14
B. Differences Between Teacher Harassment and Student Harassment Mandate Different Legal Approaches .....	16
C. Title IX's Properly Promulgated Regulations Contemplate School District Responsibility For Teacher Harassment But Not Student Harassment .....	19

<b>IV. THE IMPOSITION OF LIABILITY ON A SCHOOL DISTRICT FOR ITS RESPONSE (OR LACK OF RESPONSE) TO STUDENT MISCONDUCT IS INCONSISTENT WITH THIS COURT'S HOSTILE ENVIRONMENT JURISPRUDENCE</b> .....	20
<b>V. THE DEPARTMENT OF EDUCATION'S POLICY GUIDANCE ON "PEER HARASSMENT" IS NOT ENTITLED TO DEFERENCE BY THIS COURT</b> .....	22
<b>CONCLUSION</b> .....	25

## TABLE OF AUTHORITIES

## CASES

<u>Batterton v. Francis</u> , 432 U.S. 416 (1977) .....	23
<u>Bauer v. Board of Educ.</u> , 140 N.Y.S.2d 167 (1955) .....	12
<u>Board of Educ. v. Harris</u> , 622 F.2d 599 (2d Cir. 1979) .....	23
<u>Caldwell v. Zaher</u> , 183 N.E.2d 706 (Mass., 1962) .....	13
<u>Charonnat v. San Francisco Unified Sch. Dist.</u> , 133 P.2d 643 (Cal., 1st Dist., 1943) .....	12
<u>Davis v. Monroe Cty. Sch. Bd.</u> , 120 F.3d 1390 (11th Cir. 1997) (en banc opinion) ..	10
<u>Distinctive Printing &amp; Pkg. v. Cox</u> , 443 N.W.2d 566 (Neb., 1989) .....	13
<u>Doe v. University of Illinois</u> , 138 F.3d 653 (7th Cir. 1998) .....	9, 10, 18
<u>Guardians Ass'n v. Civil Serv. Comm'n</u> , 463 U.S. 582 (1983) .....	3
<u>Gebser v. Lago Vista Sch. Dist.</u> , 118 S. Ct. 1989 (1998) .....	passim

<u>Harris v. Forklift Sys., Inc.</u> , 510 U.S. 17 (1993) .....	21
<u>Henson v. City of Dundee</u> , 682 F.2d 897 (11th Cir. 1982) .....	21
<u>INS v. Cardoza-Fonseca</u> , 480 U.S. 421 .....	24
<u>Jackson v. Hankinson</u> , 238 A.2d 685 (N.J., 1968) .....	12
<u>Kelley v. EPA</u> , 15 F.3d 1100 (D.C. Cir. 1994) .....	24
<u>Linder v. Bidner</u> , 270 N.Y.S.2d 427 (1966) .....	13
<u>Mancino v. Webb</u> , 274 A.2d 711 (Del. Super. Ct., 1971) .....	13
<u>Meritor Sav. Bank v. Vinson</u> , 477 U.S. 57 (1986) .....	21
<u>North Haven Bd of Educ. v. Bell</u> , 456 U.S. 512 (1982) .....	24
<u>Oncale v. Sundowner Offshore Servs., Inc.</u> , 118 S. Ct. 998 (1998) .....	20
<u>Pennhurst State Sch. &amp; Hosp. v. Halderman</u> , 451 U.S. 1 (1981) .....	3, 17



Rowinsky v. Bryan Ind. Sch. Dist., 80 F.3d 1006  
(5th Cir.), cert. denied, 117 S. Ct. 165 (1996) . . . passim

Schernekau v. McNabb,  
470 S.E.2d 296 (Ga. Ct. App., 1996) . . . . . 13

## STATUTES

20 U.S.C. § 1681(a) . . . . .	3, 20
42 U.S.C. § 1981a . . . . .	10
42 U.S.C. 2000e et seq . . . . .	10, 21
Ala. Const. art. XIV § 256, <u>amended by</u> Ala. Const. amend. 111 . . . . .	16
Alaska Const. art. VII, § 1 . . . . .	16
Ariz. Const. art. XI, § 1 . . . . .	16
Ark. Const. art. XIV, § 1 . . . . .	16
Cal. Civ. Proc. Code § 527.6 (West 1997) . . . . .	13
Cal. Const. art. IX, § 1 . . . . .	16
Colo. Const. art. IX, § 2 . . . . .	16
Conn. Const. art. VIII, § 1 . . . . .	16
Del. Const. art. X, § 1 . . . . .	17
Fla. Const. art. IX, § 1 . . . . .	17

Ga. Const. art. VIII, § 1 . . . . .	17
GA.CODE. ANN. § 20-2-751.3(a),(b) (Supp. 1998) . . .	11, 12
GA.CODE. ANN. § 20-2-1185(a) (1996) . . . . .	12
Haw. Const. art. IX, § 1 . . . . .	17
Idaho Const. art. IX, § 1 . . . . .	17
Ill. Const. art. X, § 1 . . . . .	17
Ind. Const. art. VIII, § 1 . . . . .	17
Iowa Const. art. IX, 2nd, § 3 . . . . .	17
Kan. Const. art. VI, § 1 . . . . .	17
Ky. Const. § 183 . . . . .	17
La. Const. art. VIII, preamble & § 1 . . . . .	17
Md. Const. art. VIII, § 1 . . . . .	17
Me. Const. art. VIII, § 1 . . . . .	17
Mich. Const. art. VIII, §§ 1 & 2 . . . . .	17
Minn. Const. art. XIII, § 1 . . . . .	17
Minn. Stat. § 609.748 (1997) . . . . .	13
Miss. Const. art. VIII, §§ 201 & 205 . . . . .	17
Mo. Const. art. IX, § 1(a) . . . . .	17

Mont. Const. art. X, §§ 1, 2 .....	17
N.C. Const. art. IX, §§ 1, 2 .....	17
N.D. Cent. Code §12.1-31.2-01 (Supp. 1993) .....	13
N.D. Const. art. VIII, §§ 1, 2 .....	17
N.J. Const. art. VIII, §4 .....	17
N.M. Const. art. XII, § 1 .....	17
N.Y. Const. art. XI, § 1 .....	17
Neb. Const. art. VII, §§ 1 .....	17
Nev. Const. art. XI, § 2 .....	17
Ohio Const. art. VI, § 2 .....	17
Okla. Const. art. XIII, § 1 .....	17
Or. Const. art. VIII, § 3 .....	17
Pa. Const. art. III, § 14 .....	17
R.I. Const. art. XII, § 1, 4 .....	17
S.C. Const. art. XI, § III .....	17
S.D. Const. art. VIII, § 1 .....	17
Tenn. Const. art. II, § 12 .....	17
Tex. Const. art. VII, § 1 .....	17

Utah Const. art. X, § 1 .....	17
Va. Const. art. VIII, § 1 .....	17
Vt. Const. ch. II, § 68 .....	17
W. Va. Const. art. XII, § 1 .....	17
Wash. Const. art. IX, § 2 .....	17
Wis. Const. art. X, §§ 2, 3 .....	17
Wis. Stat. Ann. § 813.125 (1997) .....	14
Wyo. Const. art. VII, §§ 1, 9 .....	17

## REGULATIONS

34 C.F.R. § 106.31(b) .....	3, 4, 19
-----------------------------	----------

## MISCELLANEOUS

Associated Press, <i>School Cracks Down on Hugs and Kisses</i> , THE DALLAS MORNING NEWS, Feb. 15, 1998 at 6A .....	8
Brief of the United States in <u>Rowinsky v. Bryan Ind.</u> <u>Sch. Dist.</u> , cert. petition No. 96-4, p. 2 & 11 (August, 1996) .....	24
Fred Bruning, <i>An American View: Going Overboard On</i> <i>Sexual Harassment</i> , MACLEAN'S, Oct. 21, 1996 at 15 .....	19



<i>Editorial, PITTSBURGH POST-GAZETTE, March 22, 1998 at C2</i> .....	8
Meg Greenfield, <i>Sexual Harasser?</i> THE WASHINGTON POST, Sept. 30, 1996 at A23 .....	6
Jeff Jacoby, <i>A Letter To Jonathan</i> , THE BOSTON GLOBE, Oct. 3, 1996 at A17 .....	6, 7
W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS 43 (5th ed., 1984) .....	13
<i>Kid Stuff A Silly Sexual Harassment Charge Against a 10-year Old</i> , PITTSBURGH POST-GAZETTE, Sept. 25, 1997 at A22 .....	7
Tamar Lewin, <i>Kissing Cases Highlight Schools Fears of Liability for Sexual Harassment</i> , N.Y. TIMES, Oct. 6, 1996, at A22 .....	7
CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979) .....	19
Office for Civil Rights, <i>Sexual Harassment Guidance: Peer Sexual Harassment (DRAFT)</i> , 61 Fed. Reg. 42728 (Aug. 14, 1996) .....	6, 23
Office for Civil Rights, <i>Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties</i> , 62 Fed. Reg. 12,034 (1997) .....	passim

OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981). ....	23
Audra Pontes, <i>Peer Sexual Harassment: Has Title IX Gone Too Far?</i> 47 EMORY L.J. 341, 349-52 (Winter, 1998) ..	4
Sasha Ransom, Comment, <i>How Far Is Too Far? Balancing Sexual Harassment Policies and Reasonableness In the Primary and Secondary Classrooms</i> , 27 SW. U. L. REV. 265, 267 (1997) .....	8, 12, 13
Restatement 2d of Torts § 13 (1965) .....	13
<i>Seven Year Old Suspended 5 Days For Kissing Classmate</i> , BUFFALO NEWS, Oct. 2, 1996 at A16. ....	7
<i>Sexual Harassment Kissing Away Reason</i> , ARIZONA REPUBLIC, Sept. 27, 1996, at B6. ....	6
Transcript of Oral Argument before the United States Supreme Court in <i>Gebser v. Lago Vista Ind. Sch. Dist.</i> , 1998 WL 146703, *34-35 (March 25, 1998) .....	10

**BRIEF OF AMICUS CURIAE  
INDEPENDENT WOMEN'S FORUM  
IN SUPPORT OF THE RESPONDENTS**

---

**INTEREST OF AMICUS CURIAE<sup>1</sup>**

The Independent Women's Forum ("IWF") is a non-profit, non-partisan organization founded by women to foster public education and debate about legal, social, and economic policies affecting women and families. The IWF is committed to policies that promote individual responsibility, limited government, and economic opportunity.

**SUMMARY OF THE ARGUMENT**

Our nation's schools are today increasingly expected to address student conduct which, twenty years ago, would have been thought to be a matter of parental responsibility, including conduct which would simply have been unimaginable in a bygone era. Petitioner in this case carries that expectation to its illogical extreme, asserting that a school that does not respond effectively to an allegation of misconduct *by one of its students* has committed an intentional act of sex discrimination under Title IX of the Education Amendments of 1972, on the basis of which the school may face private lawsuits for monetary damages and the loss of all federal funding.

Neither the statutory framework of Title IX, nor this Court's precedents, support the view that a school district may be held liable under that statute for failing to respond to a complaint of student misconduct. Nevertheless, for the past few years, the Department of Education's Office For Civil Rights (the "OCR") has employed the specter of such liability as a tool to force schools to adopt inflexible and draconian

---

<sup>1</sup> Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.



policies that limit the discretion of teachers in dealing with student misconduct. The Petitioner now asks this Court to give force of law to the OCR's views on this issue and, thereby, to visit even more broadly and profoundly upon the nation's schools the deleterious effects which the OCR's position has already begun to have.

The IWF believes that the creation of a new private right of action under Title IX for student misconduct will not further the non-discrimination policies of the statute and, in fact, will frustrate the educational mission of our public schools. Such a cause of action would, in effect, transform Title IX into a Federal Student Civility Code, force schools to enact large and unnecessary bureaucracies, and lead schools to institute extreme and inflexible measures that will infringe the liberties of all students. Because imposing liability on schools for the misconduct of their students – whom public schools neither choose as attendees nor have free reign to exclude – will harm all students, this Court should not create such a cause of action out of whole cloth.

### STATEMENT OF THE CASE

Amicus hereby adopts and incorporates by reference the Statement of the Case set forth in Respondent's brief.

### ARGUMENT

#### I. NEITHER THE TEXT OF TITLE IX NOR THE IMPLEMENTING REGULATIONS CONTEMPLATE SCHOOL DISTRICT LIABILITY FOR STUDENTS BEHAVING BADLY.

Title IX of the Education Amendments of 1972 provides in pertinent part that:

[n]o person . . . shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected

to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). Title IX was enacted to provide educational institutions and programs an incentive to end institutional sex discrimination and operates by conditioning an offer of federal funding on a promise by the recipient not to discriminate.<sup>2</sup> Gebser v. Lago Vista Sch. Dist., 118 S.Ct. 1989, 1997 (1998) (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 599 (1983) and Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

The language of Title IX provides no warning that a school district's federal funding might be contingent on its response to discrimination by non-agent, third-parties. Nor do the properly promulgated implementing regulations provide any basis for linking a grant of federal funding to a school district's response to misconduct by third-party students. To the contrary, the implementing regulations prohibit only *affirmative* actions by grant recipients. See 34 C.F.R. § 106.31(b) (1997).<sup>3</sup> Indeed, the only mention of third-

<sup>2</sup> Because students are not direct recipients of the assistance to which Title IX refers, the actions of students cannot themselves constitute a violation of Title IX. See Rowinsky v. Bryan Ind. Sch. Dist., 80 F.3d 1006, 1012-13 (5th Cir.), cert. denied, 117 S.Ct. 165 (1996); cf. 34 C.F.R. § 106.31(b) (prohibiting certain practices by grant recipients only).

<sup>3</sup> The regulations provide that:

[A] recipient [school or other educational program] shall not, on the basis of sex:

- (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Provide different aid, benefits, or services or provide [them] in a different manner;
- (3) Deny any person any such aid, benefit, or service;
- (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment; . . .
- (6) Aid or perpetuate discrimination against any person by providing

parties is found in subsection (b)(6) of the regulations, which prohibits grant recipients from "[a]id[ing] or perpetuat[ing] discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees." This regulation, by its terms, prohibits schools from significantly assisting third-parties which discriminate in *providing services or benefits to students or employees*, such as bus companies, outside special education consultants or school insurers. Students are clearly *not* the type of third-parties referred to by subsection (b)(6), which, in essence, applies to co-venturers selected by schools to help fulfill their educational mission. The specificity of the prohibition set forth in subsection(b)(6) strongly suggests that any broader application to third-parties is beyond the scope of Title IX.<sup>4</sup> Thus, neither the text of the statute nor the implementing regulations support the position that school districts may be held liable for monetary damages or subject to government sanction because of its response (or lack thereof) to misconduct by its students. *See generally* Audra Pontes, *Peer Sexual Harassment: Has Title IX Gone Too Far?*, 47 EMORY L.J. 341 (Winter, 1998).

---

significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. § 106.31(b) (1997).

<sup>4</sup> Nor do school districts that fail to deal effectively with complaints of student misconduct limit a student "in the enjoyment of any right, privilege, advantage, or opportunity." 34 C.F.R. § 106.31(b)(7). The language of this subsection prohibits recipients from affirmatively acting to limit a student on the basis of sex; it cannot reasonably be read to include the actions of third-parties. *See Rowinsky*, 80 F.3d 1006, 1014 n.21.

## II. CREATING A FEDERAL CAUSE OF ACTION FOR "PEER HARASSMENT" WILL NOT FURTHER THE PURPOSES OF TITLE IX AND WILL FRUSTRATE THE EDUCATIONAL MISSION OF OUR PUBLIC SCHOOLS.

### A. There Is No Principled Basis To Elevate Sexual Misconduct By A Student Above Other Serious Student Misconduct.

No one disputes that our nation's schools must address serious student misconduct on a daily basis. The harassment of a student by his or her classmates – whether sexual or otherwise – is always deplorable. But, in asking this Court to create a federal cause of action for "peer sexual harassment", Petitioner implausibly elevates inappropriate sexual behavior above all other types of student misconduct. Clearly, a known gang member who is caught bringing a gun to school poses a far greater potential threat to his peers (and to society at large) than the student who repeatedly offends his classmates with dirty jokes. Under Petitioner's position, students offended by a classmate's dirty jokes could sue their school in federal court for monetary damages under Title IX, while students frightened by gangs would have no recourse under federal law.

### B. Out Of Fear Of Being Held Liable For Conduct Beyond Their Control, Schools Will Adopt Draconian Policies Which Limit Basic Rights And Freedoms Of All Students.

Neither the text nor history of Title IX suggest that it was intended to force school administrators to become thought-police, gatekeepers of proper etiquette, or the constant arbiters of sexual/developmental growth-related conflict. Yet, under the interpretation of Title IX advocated by the Petitioner, and forced on schools by the Department of



Education for the past two years, this is exactly what has happened.

Apparently not satisfied with its own properly promulgated regulations, the OCR issued in August 1996 a "policy guidance" which unlawfully and illogically attempted to enlarge Title IX's scope to include liability for student-on-student harassment.<sup>5</sup> See Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 FED.REG. 12,034 at 12,039 (1997) (hereinafter, "OCR Guidance"), pertinent parts of which were first published at 61 FED.REG. 42728 (Aug. 14, 1996).<sup>6</sup>

Within weeks of the issuance of the OCR Guidance, school administrators in North Carolina removed then six-year old Johnathan Prevette from his first grade class for a day, prevented the boy from attending a school ice-cream party, and sent him home with a "Discipline Referral" for kissing a classmate on the cheek. See e.g., Meg Greenfield, *Sexual Harasser?* THE WASHINGTON POST, Sept. 30, 1996 at A23; Jeff Jacoby, *A Letter To Jonathan*, THE BOSTON GLOBE, Oct. 3, 1996 at A17. The boy was warned that if he was caught again kissing, hugging, or hand-holding, he would be suspended. *Id.* at A17; *Sexual Harassment Kissing Away Reason*, ARIZONA REPUBLIC, Sept. 27, 1996, at B6.

Unfortunately, young Johnathan Prevette was not the only child to fall victim to his school's fear of penalty by the OCR. In New York, a seven-year old, second-grader was suspended for five days for kissing a girl and tearing a button

<sup>5</sup> For the reasons discussed in Section V, *infra*, the OCR's policy guidance on "peer harassment" is legally unsupportable and entitled to no deference by this Court.

<sup>6</sup> The OCR Guidance states that a school should be found in violation of Title IX for sexual harassment if: "(i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action." 62 FED.REG. at 12,039.

off her skirt.<sup>7</sup> See *Seven Year Old Suspended 5 Days For Kissing Classmate*, BUFFALO NEWS, Oct. 2, 1996 at A16. And in 1997, school officials in Pittsburgh, Pennsylvania suspended a ten-year old, fourth-grader for two days because he grabbed a girl from behind and subjected another girl to an unwanted hug. *Kid Stuff A Silly Sexual Harassment Charge Against a 10-year Old*, PITTSBURGH POST-GAZETTE, Sept. 25, 1997 at A22.

Due to the rising fear of agency sanction and private lawsuits, reactions such as these to normal childhood behaviors have become quite common.<sup>8</sup> Under threat of penalty by the OCR, many schools have adopted draconian policies which limit the freedoms of all students and circumscribe the ability of teachers and other professional administrators to confront student misconduct on a case-by-case basis. Such policies often provide automatic penalties for such innocent behavior as "hand-holding" and "repeatedly asking out a person who has stated that . . . she is not interested." See Jacoby, *Letter*, THE BOSTON GLOBE at A17. To cite just a few examples, in Mishawaka, Indiana, the Elm Road School has issued a policy forbidding fourth-graders from holding hands, passing romantic notes, or chasing members of the opposite sex at recess. See *Editorial*, PITTSBURGH POST-GAZETTE, March 22, 1998 at C2. And in Fullerton, California, the Nicolas Junior High School has banned all public displays of affection, including hugging and

<sup>7</sup> When asked why he removed the button from his classmate's skirt, the seven-year-old boy replied that it reminded him of "Corduroy", the teddy bear in his favorite book, who is missing a button from his overalls. See *Seven Year Old Suspended 5 Days For Kissing Classmate*, BUFFALO NEWS, Oct. 2, 1996 at A16.

<sup>8</sup> See Tamar Lewin, *Kissing Cases Highlight Schools Fears of Liability for Sexual Harassment*, N.Y. TIMES, Oct. 6, 1996, at A22, A22 ("While the recent suspensions of two little boys for kissing girls were widely seen as excessive, they highlighted the confusion that is sweeping schools as educators grapple with a growing fear that they may be sued for failing to intervene when one student sexually harasses another.")

kissing. *See* Associated Press, *School Cracks Down on Hugs and Kisses*, THE DALLAS MORNING NEWS, Feb. 15, 1998 at 6A.

Unnatural measures such as these are the natural result of the application of workplace norms to children and adolescents. Unfortunately, the lessons taught by such responses are that even childish expressions of affection and adolescent courtship rituals constitute sexually predatory behavior. Rather than teaching students to respect each other's boundaries and to resolve conflicts maturely, many of the sexual harassment policies already adopted by schools enforce neo-Victorian mores and cultivate a gender-based culture of victimhood. *See* Sasha Ransom, Comment, *How Far Is Too Far? Balancing Sexual Harassment Policies and Reasonableness In the Primary and Secondary Classrooms*, 27 SW. U. L. REV. 265, 267 (1997) (*hereinafter*, "Ransom, *How Far Is Too Far?*") (arguing that the grafting of workplace norms onto the schoolyard creates gender-based conflict in the schools and undermines educational goals).

This Court's creation of a federal cause of action for "peer harassment" in schools will only magnify the fears of school administrators and encourage the adoption of misguided measures like the ones catalogued above. To the contrary, the refusal to invent a private right of action against school districts for "peer harassment" will allow schools the flexibility to deal with disciplinary problems on a case-by-case basis, without the looming threat of government imposed sanctions and complex federal litigation.

### C. Allowing Students To Hold Schools Financially Liable For Misconduct By Other Student Will Drain Scarce Resources From *All* Students.

Petitioner asks this Court to hold that a student may sue his or her school district for monetary damages whenever school officials do not respond appropriately to a complaint

of student misconduct. It is unclear what Petitioner means by "appropriate." In the case at bar, the Complaint states that the school principal "threatened" the alleged harasser and separated the complaining student and the boy who was bothering her within their fifth-grade classroom. Nevertheless, the Petitioner suggests that the school's response constituted deliberate indifference, and, thus, violated Title IX's prohibition on sex discrimination. Petitioner does not say what action she believes would have effectively stopped the harassment. Indeed, much of the conduct complained of in Petitioner's case occurred in the hallways or other settings where no measure short of expulsion could have prevented its occurrence. In effect, then, under the Petitioner's theory, the only practical way for schools to ensure that they will not lose federal funding or be held financially liable under Title IX will be to suspend or expel students accused of harassment. Such a response would, of course, open the school district up to a potential lawsuit by the accused for denial of public education entitlements. *See infra* Section III.b and n. 12; *Doe v. University of Illinois*, 138 F.3d 653, 679 (7th Cir. 1998) (Posner, C.J., *dissenting from denial of reh'g en banc*) ("[l]iability for failing to prevent or rectify sexual harassment of one student by another places a school on a razor's edge, since the remedial measures that it takes against the alleged harasser are as likely to expose the school to a suit by him as a failure to take those measures would be to expose the school to a suit by the victim of the alleged harassment.")

In order to avoid lawsuits from complaining students, while protecting the due process rights of the accused, school districts would be forced to develop costly new bureaucracies to investigate and respond to complaints of "peer harassment."<sup>9</sup> Moreover, money ordinarily spent on books,

<sup>9</sup> The Department of Education's Office for Civil Rights urges schools to conduct full-blown hearings in which the accuser and the accused have



sports equipment, and musical instruments, would be spent on lawyers fees<sup>10</sup> and possibly large damage awards.<sup>11</sup> "Although the cost of peer-on-peer harassment under Title IX will be borne by the school systems (vis-a-vis 'deep pocketed' taxpayers), it is the students who will ultimately suffer through reduced funding in their education pursuits." *Doe*, 138 F.3d at 675 (Coffey, J., concurring). In addition to these tangible costs, the creation of a federal cause of action for student misconduct would mean that students (often the only witnesses to schoolyard harassment) would have to take valuable time away from their studies to answer questions from lawyers, prepare for depositions, and attend trials. *Davis v. Monroe Cty. Sch. Bd.*, 120 F.3d 1390, 1404 (11th Cir., 1997) (*en banc* opinion).

Unlike private employers in the Title VII context, public schools cannot pass along these "costs" to paying consumers. Thus, although Congress certainly is free, after a careful weighing of such costs, to decide that the benefits of creating a cause of action for "peer harassment" outweigh these high costs, in the absence of a clear expression of Congressional

---

the "opportunity to present witnesses and other evidence." OCR Guidance, 62 Fed.Reg. at 12044.

<sup>10</sup> Unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits sex discrimination in employment, Title IX does not provide for agency investigation and conciliation of complaints prior to the filing of a case in federal court, and thus fails to provide a means by which frivolous suits may be weeded out (or meritorious ones settled) at minimal cost.

<sup>11</sup> Title IX, unlike Title VII, contains no statutory cap on damage awards. Compare 42 U.S.C. § 1981a (limiting the amount of damages a plaintiff can recover under Title VII). In smaller school systems, even one large jury verdict against the district could bankrupt the entire system. See Transcript of Oral Argument before the United States Supreme Court in *Gebser v. Lago Vista Ind. Sch. Dist.*, 1998 WL 146703, \*34-35 (March 25, 1998) (argument of Wallace B. Jefferson for Respondent Lago Vista Independent School District) (noting that in 1992-93 the entire budget for the Lago Vista school district was only \$1.6 million)

intent this Court should not carve out a new basis for liability under Title IX that will inure to the detriment of all students.

#### D. Schools Already Have Ethical And Legal Obligations To Protect The Students In Their Care.

A refusal by this Court to create a cause of action under Title IX for damages stemming from student misconduct will not discourage schools from confronting inappropriate student behavior. To the contrary, schools have ethical and legal obligations to protect students within their charge from harassment and intimidation by their peers. Indeed, the premise underlying Petitioner's argument – that, absent the threat of a federal discrimination lawsuit, teachers and other school administrators will not seek to rectify student misconduct – is deeply flawed. In truth, no teacher wants the educational environment disrupted by harassment, violence, or unruly behavior. Schools and teachers are judged by their very ability to teach and, therefore, already have good reason to attempt to minimize behavior that interferes with the learning process.<sup>12</sup>

In addition to these obvious incentives to confront inappropriate student behavior, schools have a legal obligation to protect the students in their charge from harm. For example, in the case at bar, the Monroe Country Board of Education is already required by state law to "adopt a student code of conduct" and "provide for disciplinary action against students who violate [that] code." GA.CODE. ANN. §

---

<sup>12</sup> Indeed, for hundreds of years, teachers and principals have disciplined schoolyard bullies in the absence of any federal cause of action regulating the handling of such troublemakers. There is no evidence whatsoever that teachers and principals are unwilling to discipline similarly "peer harassment". Nor is there any evidence that "peer harassment" is not equally amenable to administrative control without need for a legal sword of Damocles, born from Title IX, hanging over the heads of our public schools.

20-2-751.3(a),(b) (Supp. 1998). Georgia law also requires that schools develop a "safety plan" to help curb school violence and promote a safe learning environment. *Id.* § 20-2-1185(a) (1996).

Moreover, schools that are negligent in the supervision of their students may be held liable in tort for injuries suffered by students as a result of that negligence. Thus, numerous cases show that, where a teacher or other school official negligently fails to supervise students in a particularly dangerous circumstance, or directs or permits a student to embark on a course of conduct which might reasonably be foreseen to result in injuries to another student, the school district may be financially liable. *See e.g., Jackson v. Hankinson*, 238 A.2d 685 (N.J., 1968) (school board can be held liable for personal injuries suffered by student where person in authority failed to exercise "reasonable supervisory care"); *Bauer v. Board of Educ.*, 140 N.Y.S.2d 167 (1955) (where school district created condition of danger, school district could be held liable for injuries to student resulting from condition); *Charonnat v. San Francisco Unified Sch. Dist.*, 133 P.2d 643 (Cal., 1st Dist., 1943) (similar). The legal obligations already imposed on schools under state laws demonstrate that the remedy sought by the Petitioner is unnecessary and will serve only to drain schools of already scarce resources and impose a gender-based culture of victimhood on our nation's youth.

#### E. Students Harassed By Classmates Already Posses A Variety of Legal Remedies And Do Not Need Federally Imposed Gender-Politics to Protect Them.

Students who are harassed or intimidated by other students have at their disposal an array of remedies that fall short of instituting a federal action for sex discrimination. For example, a victim of harassment may bring a state law civil action in tort. *See Ransom, How Far Is Too Far?*, 27 SW.

U. L. REV. at 273-74 (suggesting tort as an appropriate remedy for student harassment). Thus, a student who is fondled, pinched, or grabbed without her consent may sue her harasser for battery. *See id.*; RESTATEMENT 2D OF TORTS § 13 (1965). A student who is verbally threatened or intimidated by a classmate (or group of classmates) may sue her persecutors for assault. *See Ransom, How Far Is Too Far?*, 27 SW. U. L. REV. at 273-74; W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS 43 (5th ed., 1984) (defining assault as one person causing another person "apprehension of a harmful or offensive contact"). In some states, victims may even sue the parents of the student harassers in tort.<sup>13</sup> Moreover, and as explained *supra*, in limited situations, a student who suffers personal injuries at the hands of another student may hold the school district liable under state law.

A student who is harassed by a fellow student may also petition a court for a restraining order – a violation of which would lead to criminal charges against the harasser.<sup>14</sup>

<sup>13</sup> *See e.g., Schernekau v. McNabb*, 470 S.E.2d 296 (Ga. Ct. App., 1996); *Distinctive Printing & Pkg. v. Cox*, 443 N.W.2d 566 (Neb., 1989); *Mancino v. Webb*, 274 A.2d 711 (Del. Super. Ct., 1971); *Linder v. Bidner*, 270 N.Y.S. 2d 427 (1966); *Caldwell v. Zaher*, 183 N.E.2d 706 (Mass., 1962).

<sup>14</sup> *See e.g., N.D.CENT.CODE* §12.1-31.2-01 (Supp. 1993) (North Dakota) (providing that a person who is a victim of "unwanted acts, words or gestures that are intended to adversely affect the safety, security or privacy" of the victim may seek a court order restraining the individual from having contact with the alleged victim; violation of the court order is punishable by imprisonment of up to one year and/or a fine of up to \$1,000.00); MINN. STAT. § 609.748 (1997) (Minnesota) ("[a] person who is a victim of harassment may seek a restraining order from the district court . . . . The parent or guardian of a minor who is a victim of harassment may seek a restraining order from the district court on behalf of the minor."); CAL. CIV. PROC. CODE § 527.6 (West 1997) (California) (victims of harassment may seek a TRO and injunction against the harasser; the court may issue a permanent injunction if the court finds by "clear and convincing evidence that unlawful harassment exists"; any willful violation of an injunction is punishable as a contempt of court);



Ultimately, a student who is physically attacked by a peer may press criminal charges against his or her assailant.

These remedies are available to all victims of student misconduct – whether or not the misconduct at issue is sex-based. The remedies provided under state law offer a mechanism whereby the competing interests of accused and accusing students may properly and fairly be adjusted without resort to federal litigation against the school.

To acknowledge that "peer sexual harassment" is not actionable under Title IX of the Education Amendments of 1972 is not to condone such conduct. To the contrary, a refusal to create such a federal cause of action is to recognize that all forms of violence and harassment by students against their peers are objectionable and that primary responsibility for addressing such misconduct rests not with federal agencies but with parents and schools and the laws of the various states.

### III. ALTHOUGH SCHOOLS MAY BE HELD LIABLE FOR KNOWN TEACHER HARASSMENT, A DIFFERENT STANDARD OF LIABILITY MUST APPLY TO STUDENT MISCONDUCT.

#### A. This Court's Holding In *Gebser* Confirms The View That Schools Are Not Liable Under Title IX For The Harassment of One Student By Another.

In *Gebser v. Lago Vista Independent School District*, this Court held that, although schools are not vicariously liable for the acts of teachers, a school district may be held liable for the sexual harassment of a student by a teacher, where a high level school official is on notice of allegations of teacher harassment and responds to those allegations with deliberate

WIS.STAT.ANN. § 813.125 (1997) (Wisconsin) (victims of harassment may seek restraining order and injunction against the harasser).

indifference. 118 S. Ct. 1989, 1999 (1998). In other words, an affirmative intent to discriminate may be inferred from a school official's failure to act when notified that one of the school's agents is discriminating on the basis of sex.

Nothing in *Gebser* points to the conclusion that a school district may lose its federal funding, and be subject to financial liability, for failing to respond to a complaint of harassment by a *non-agent, third-party student*. Indeed, contrary to Petitioner's contention that *Gebser* eliminated any agency requirement for imposition of liability under Title IX, *see Brief For The Petitioner* at 31-32; *see also Brief of The United States As Amicus Curiae Supporting Petitioner* at 9 & 13, *Gebser* merely held that schools will not be held *strictly* liable for the acts of its teachers/agents. 118 S.Ct. at 1996-97 & 1999. However, because teachers are employees of the school district, a school official's failure to respond to an allegation that a teacher is sexually harassing students can be viewed as a tacit endorsement of the teacher's behavior, thus giving rise to a basis for liability under Title IX. Although the basis for liability must be a school official's own conduct – or lack thereof – the conduct at issue is a failure to respond to known acts of discrimination *by agents of the school district*. Thus, *Gebser* does *not* eliminate agency theory from the analysis. To the contrary, the rule of *Gebser* is that agency status is *necessary*, but *not sufficient*, to create liability for a school district under Title IX.<sup>15</sup>

<sup>15</sup> Petitioner and the United States also misread *Gebser's* holding that, in order for school districts to be held liable for sexual harassment, "an official who...has authority to address the alleged discrimination and to institute corrective measures" must have actual knowledge of the harassment and respond with deliberate indifference. 118 S. Ct. at 1999. Petitioner and the United States read this language to mean that notice to a teacher of student-on-student harassment constitutes sufficient notice to the district (since teachers clearly have the authority to deal with issues of student behavior). *See Brief For The Petitioner* at 31; *Brief Of The United States* at 9. This interpretation contradicts *Gebser's* express teaching that school districts are not vicariously liable for a teacher's conduct. The

### B. Differences Between Teacher Harassment and Student Harassment Mandate Different Legal Approaches.

Petitioner attempts to blur the lines between student misconduct and the sexual harassment of a student by a teacher. Peer harassment, of course, differs from harassment by a teacher in several important respects, and, accordingly, warrants different treatment under the law.

First, as mentioned above, teachers (unlike students) are agents of the school district. School districts are responsible for selecting their teachers and school districts retain significant discretion to discharge public school teachers. As such, school districts can be expected to exercise effective control over teachers, and may properly be held liable for a deliberate refusal to exercise such control. A school district that places a sexual harasser in a position of authority over children and, with deliberate indifference, allows him to continue abusing this power even after school officials are on notice of his misconduct, can reasonably be viewed as possessing *an intent* to create a hostile environment.

By contrast, a school district unfortunate enough to encounter troublemakers in its student body is not responsible for *creating* a hostile environment. A public school cannot select the students it wishes to teach, and cannot simply weed out students with discipline problems and retain only the well-behaved ones. Indeed, students in every state enjoy the right to a free public education guaranteed by law.<sup>16</sup> Thus, a school district faced with a

adoption of this position would lead to the anomalous result that school districts would face strict liability for a teacher's negligence in failing to respond to a complaint of student misconduct, but not for a teacher's own deliberate act of intentional sex discrimination.

<sup>16</sup> See Ala. Const. art. XIV § 256, amended by Ala. Const. amend. 111; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 1; Colo. Const. art. IX, § 2; Conn.

student harasser is itself a victim of the student's unruly behavior, and its failure to discipline such a student does not necessarily evince an endorsement of the behavior or an *intent* to discriminate. Cf. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28-29 (under the spending clause, monetary damages are only available for intentional violations).

Moreover, school districts simply cannot exercise the same measure of control over the thousands of students in their charge as they can over the acts of a few hundred agent/employees. In addition to their sheer numbers, children (and adolescents in particular) are less likely to follow norms of good behavior than adults. See Doe, 138 F.3d at 675 (Coffey, J. concurring) (citing Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP.L.REV. 1763, 1767, 1772 (1995)). Thus, reports of student misconduct are more numerous than those of teacher misconduct and cover a wide range of conduct, much of which may be trivial or irrelevant to sex discrimination. In other words, a school administrator may not (at first blush) recognize such a report as anything

Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1; Haw. Const. art. IX, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, 2nd, § 3; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, preamble & § 1; Me. Const. art. VIII, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5, § 91; Mich. Const. art. VIII, §§ 1 & 2; Minn. Const. art. XIII, § 1; Miss. Const. art. VIII, §§ 201 & 205; Mo. Const. art. IX, § 1(a); Mont. Const. art. X, §§ 1, 2; Neb. Const. art. VII, §§ 1; Nev. Const. art. XI, § 2; N.H. Const. pt. 2, art. 83; N.J. Const. art. VIII, § 4; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, §§ 1, 2; N.D. Const. art. VIII, §§ 1, 2; Ohio Const. art. VI, § 2; Okla. Const. art. XIII, § 1; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1, 4; S.C. Const. art. XI, § III; S.D. Const. art. VIII, § 1; Tenn. Const. art. II, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. II, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 2; W.Va. Const. art. XII, § 1; Wis. Const. art. X, §§ 2, 3; Wyo. Const. art. VII, §§ 1, 9.



more than a garden-variety complaint that "Johnny is bothering me." <sup>17</sup>

Because schools have an obligation to educate *all* students, and because students are inherently more difficult to control than adult employees, the failure of a school district to respond to a particular charge of student misconduct cannot possibly be translated into an act of intentional discrimination. *Cf. Doe*, 138 F.3d at 678 (Coffey, J., *concurring*) (noting that requiring schools to eliminate harassment by students upon other students "would be an impossible task, for schools are full of all sorts of kids. . .[a]nd unlike harassers in the work place, students can't be fired.")

Second, because of the position of trust occupied by teachers, sexual conduct by a teacher toward a student poses a much greater risk of harm, both to the student and to society, than does inappropriate behavior by a child. Whereas sexual conduct by teachers directed towards elementary or secondary students is never appropriate, much of the sexual conduct that occurs between pre-adolescent and adolescent students can easily be viewed as part of the normal give and take between girls and boys of this age group. At the primary school level, the alleged harassers are children, who often have no notion of sex, let alone "sexual harassment". See Fred Bruning, *An American View: Going Overboard On Sexual Harassment*, MACLEAN'S, Oct. 21, 1996 at 15. Thus, at the primary or secondary school level, a kiss on the cheek, a

<sup>17</sup> It is, of course, true that, in order to avoid the possibility of Title IX litigation, a school district might err on the side of caution (as many employers do in the face of sexual harassment allegations) and simply expel accused harassers even where the facts are in dispute, or the conduct ambiguous in nature. Putting aside the risk that the expelled student might bring his own claim against the school district, *see supra*, the prospect of primary and secondary school students being set adrift in the world – and barred from further public education – is profoundly troubling. Yet, in many cases this would be the only effective means of ensuring the cessation of the allegedly harassing conduct.

sexually suggestive compliment, and the persistent pursuit of a romantic relationship are normal parts of growing up.

Indeed, at the primary and secondary school level, it is even questionable whether sexual misconduct by students is properly labeled "sexual harassment" at all. As Professor Catherine MacKinnon has noted, the problem of sexual harassment arises "in the context of unequal power." CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1 (1979). In an educational setting, the power relationship is the one between the student and the teacher. See *Rowinsky v. Bryan Ind. Sch. Dist.*, 80 F.3d 1006, 1011 n.11 (5th Cir.), *cert. denied*, 117 S.Ct. 165 (1996) (citation omitted). In the context of two students there is, in fact, no established power differential. A schoolyard threat or an unwanted sexual advance by a peer simply does "not carry the same coercive effect or abuse of power as [similar conduct committed] by a teacher. . . . This is not to say that the behavior does not harm the victim, but only that the analogy is missing a key ingredient – a power relationship between the harasser and the victim." See *id.* These basic differences between teachers and students plainly warrant different treatment under the law for teacher harassment and misconduct by a student, and underscore the appropriate limit of this Court's *Gebser* decision.

#### C. Title IX's Properly Promulgated Regulations Contemplate School District Responsibility For Teacher Harassment But Not Student Harassment.

Title IX's properly promulgated implementing regulations support the position that school districts bear responsibility under Title IX for the known acts of their teachers but not for the acts of their pupils. See 34 C.F.R. § 106.31(b)(6). Section 106.31(b)(6) of the regulations prohibits schools from "providing significant assistance to any . . . person wh[o] discriminates on the basis of sex in providing aid, benefit[s],

or service[s] to students or employees." Teachers clearly provide educational services to students. Thus, even absent vicarious liability, a school district that "provid[es] significant assistance to" a teacher who is sexually harassing his female students (say, by deliberately turning a blind eye and enabling him to continue undisciplined), itself violates the Act. On the other hand, students do not customarily provide "aid, benefit[s] or service[s]" to their peers and, accordingly, a school district cannot be held liable under Title IX for failing to curb harassment of one student by another.

#### IV. THE IMPOSITION OF LIABILITY ON A SCHOOL DISTRICT FOR ITS RESPONSE (OR LACK OF RESPONSE) TO STUDENT MISCONDUCT IS INCONSISTENT WITH THIS COURT'S HOSTILE ENVIRONMENT JURISPRUDENCE.

Title IX does not prohibit sexual harassment *per se*. Rather, Title IX (like Title VII) simply prohibits discrimination "on the basis of sex". See 20 U.S.C. § 1681(a); 42 U.S.C. § 2000e *et seq.* The failure of a school to deal effectively with a particular complaint of student misconduct is *not* discrimination "on the basis of sex" and is simply not a cognizable basis for Title IX liability by a school.

This Court has long held that not every instance of harassment constitutes unlawful sex discrimination. See Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998) ("We have never held that . . . harassment . . . is automatically discrimination because of sex merely because the words used have sexual content or connotations."). Indeed, the critical issue in determining whether alleged harassment rises to the level of unlawful discrimination is "whether members of one sex are exposed to disadvantageous [conditions] to which members of the other sex are not

exposed." Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., *concurring*); cf. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 & 66 (1986) (although harassment *because of sex* may constitute unlawful sex discrimination, not all workplace harassment is discriminatory). Thus, abuse or misconduct directed at members of both sexes is not discrimination *on the basis of sex* and is not actionable under federal law. See e.g. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) (in order to prove a claim for hostile environment sexual harassment, the plaintiff must show that *but for* the fact of her sex, she would not have been the object of harassment) (*cited in Meritor*, 477 U.S. at 66-67); cf. Harris, 510 U.S. at 25.

Under these well-established principles, a twelfth-grade boy who continuously harasses the girls and the boys in the freshman class has not created a hostile environment "on the basis of sex," and his school should not face liability or a loss of federal funding under Title IX for his conduct. Likewise, a school district that treats equally complaints of student harassment by both girls and boys, has not discriminated "on the basis of sex" and should not face the prospect of monetary damages or a loss of federal funding under Title IX.

By contrast, a school district that consistently treats complaints of student harassment by girls differently than similar complaints by boys *has* violated Title IX. In such a case, the school is liable, not for its failure to respond to any one complaint, but rather, for its selective and discriminatory enforcement of the school's disciplinary rules. See 34 C.F.R. §106.31(b)(2-3) (1997) (prohibiting schools that accept federal funding under Title IX from treating students differently on the basis of sex); Rowinsky, 80 F.3d at 1010 & 1016. Indeed, this type of disparate treatment of similarly-situated male and female students by educational institutions is precisely the type of discriminatory practice that Title IX seeks to remedy.

Under Petitioner's theory of liability, however, school



districts would face the prospect of a loss of federal funding and potentially exponential monetary damages even where school officials did not themselves discriminate or endorse the complained of harassment. Moreover, there is no indication that, under Petitioner's theory of liability, the complained of harassment even needs to be "on the basis of sex." Thus, according to Petitioner's view, the boorish senior who harasses both the girls and boys in the freshman class has committed "sexual harassment" for which the school district may be held liable if it fails to act once on notice.

In other words, under the interpretation of the statute urged by the Petitioner, school districts should be held liable under Title IX whenever they fail to react to *any* type of harassment or sexual misconduct by students – irrespective of whether or not the conduct created a disadvantageous environment for one sex and irrespective of whether complaints by both sexes are treated equally by the district. In effect, the Petitioner urges this Court to create a federal private right of action for conduct that is not even discriminatory, as this Court's cases define that term. Such a result would ignore the theoretical underpinnings of federal sexual harassment law and, in effect, transform Title IX into a Federal Student Civility Code.<sup>18</sup> Such an expansive and far reaching change in federal discrimination law is for the Congress, not the judicial branch, to adopt.

#### V. THE DEPARTMENT OF EDUCATION'S POLICY GUIDANCE ON "PEER HARASSMENT" IS NOT ENTITLED TO DEFERENCE BY THIS COURT.

Apparently recognizing the weakness of their case as a matter of law and logic, Petitioner urges this Court to defer blindly to the OCR's latest interpretation of Title IX. *See Brief For The Petitioner* at 34. Petitioner's reliance on the

<sup>18</sup> Indeed, such a result would create an even broader basis for liability than in the employment context.

OCR's current interpretations – which were, in fact, rejected by this Court only six months ago in *Gebser* – is clearly misplaced.

The deference accorded an interpretive ruling depends on such factors as the circumstances of its promulgation, the consistency with which the agency has adhered to the position announced, the evident consideration which has gone into its formulation, and the nature of the agency's expertise. *Board of Educ. v. Harris*, 622 F.2d 599, 613 (2d Cir. 1979) (citing *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977)).

Contrary to Petitioner's suggestion, the OCR's interpretation of the statute as encompassing "peer harassment" is *not* long-standing. In fact, prior to the issuance of the OCR Guidance, existing OCR policy memoranda defined sexual harassment as "verbal or physical conduct of a sexual nature imposed on the basis of sex, by an *employee or agent* of the recipient," and did not address the question of liability for student misconduct. *See* OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981). In fact, the OCR's current interpretation was first published on August 14, 1996 – after the Fifth Circuit rejected a claim of "peer harassment" against a school district by a student in *Rowinsky v. Bryan Ind. Sch. Dist.*, and just in time to be cited in the cert petition filed in this Court in the same case. *See* Office for Civil Rights, *Sexual Harassment Guidance: Peer Sexual Harassment (DRAFT)*, 61 FED.REG. 42728 (Aug. 14, 1996); Brief of the United States in No. 96-4, p. 2 & 11 (August, 1996). The OCR refused public comment on its dramatic departure from existing interpretations of Title IX. *See* 61 FED.REG. 42728 (accepting comment only on "whether the Guidance is clear and complete"); 62 FED.REG. at 12035 (the OCR "did not request substantive comments" regarding its interpretation of the Act as prohibiting student-on-student harassment). The

timing of the Guidance's initial release, combined with the agency's refusal to take substantive public comment, manifestly demonstrates that it was adopted, not as a clarification of existing law, but rather, as a litigation strategy to push the courts into adopting a novel expansion of the law.

The fact that the OCR's current position was adopted only two years ago as part of a deliberate litigation strategy (and is, indeed, inconsistent with its prior pronouncements) clearly demonstrates that the OCR Guidance is entitled to no deference by this Court. *See North Haven Bd of Educ. v. Bell*, 456 U.S. 512, 538 n. 29 & 522 n.11 (1982) (no deference given to Department of Education interpretation of Title IX that was inconsistent with prior interpretations); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987) (rejecting an agency's request for deference to its position due to the inconsistency of the agency's position over the years); *see also Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994) (agency interpretations developed for purposes of litigation deserve no deference).

Supporting this conclusion is this Court's rejection of the OCR Guidance only six months ago. In *Gebser*, this Court held that adoption of the OCR's proposed standard of liability in the context of teacher-on-student harassment would "frustrate the purposes" of the statute. *See Gebser*, 118 S.Ct. at 1995 & 1997. Thus, *a fortiori* (for the reasons discussed above), Petitioner's view that this Court should defer to the OCR's Guidance with respect to "peer harassment" is wrong as a matter of law.<sup>19</sup> Accordingly, the

<sup>19</sup> Likewise, this Court should not afford deference to the OCR's enforcement actions and "findings" made in specific administrative cases because: (1) the OCR only recently began treating complaints of peer harassment as within its jurisdiction; (2) Letters of Finding are written to compel voluntary compliance with the OCR's novel interpretation of Title IX; and (3) the Letters of Finding do not reflect the "deliberate consideration of a rulemaking proceeding." *See Rowinsky*, 80 F.3d at 1015.

OCR's views are entitled to *no* weight.

## CONCLUSION

Clearly, schools should not tolerate students mistreating each other. Although the failure of a school district to respond to a particular complaint of student misconduct may reflect a grave error of judgment or sensibility, it simply is not sex discrimination within the intended scope of Title IX.

Respectfully submitted,

ANITA K. BLAIR  
INDEPENDENT WOMEN'S FORUM  
4141 N. Henderson Road  
Arlington, VA 22203  
(703) 558-4991

*Of Counsel*

RICHARD P. WARD\*  
\*Counsel of Record  
PETER L. EBB  
JENNIFER C. BRACERAS  
ROPES & GRAY  
One International Place  
Boston, MA 02110  
(617) 951-7000

*Attorneys for Amicus Curiae*



17

Supreme Court, U.S.  
**FILED**  
**NOV 10 1998**  
CLERK

No. 97-843

In The **RECEIVED**  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1998 **NOV 10 1998**

**AURELIA DAVIS** OFFICE OF THE CLERK  
**AS NEXT FRIEND OF LASHONDA D.,** SUPREME COURT, U.S.  
*Petitioner,*  
v.

**MONROE COUNTY BOARD OF  
EDUCATION, ET AL.,**

**RECEIVED**  
**SUPREME COURT, U.S.**  
**CLERK'S OFFICE**  
**NOV 10 1998**  
**P12:39**  
*Respondent*

On Writ of Certiorari to the  
United States Court of Appeals for the Eleventh Circuit

**BRIEF AMICUS CURIAE IN SUPPORT OF  
PETITIONER AURELIA DAVIS**

John W. Whitehead  
Steven H. Aden  
Kimball E. Hazelwood  
THE RUTHERFORD INSTITUTE  
1445 East Rio Road  
Charlottesville, Virginia 22901  
(804) 978-3888

November 10, 1998

24 pp

**QUESTION PRESENTED FOR REVIEW**

- I. Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which prohibits sex discrimination in federally funded education programs and activities, encompasses a cause of action for peer hostile environment sexual harassment.



**TABLE OF CONTENTS**

QUESTION PRESENTED FOR REVIEW .....	ii
TABLE OF AUTHORITIES .....	iv
I. STATEMENT OF <i>AMICUS CURIAE</i> INTEREST AND INTRODUCTION .....	2
II. SUMMARY OF ARGUMENT .....	2
III. ARGUMENT .....	3
A. A CONSTRUCTION OF TITLE IX TO PROHIBIT ALL FORMS OF SEXUAL HARASSMENT IN EDUCATION IS MOST CONSISTENT WITH THIS COURT'S HOSTILE ENVIRONMENT JURISPRUDENCE UNDER BOTH TITLE IX AND TITLE VII. ....	4
B. A RULE OF REASON IN THE INSTANT CASE SUGGESTS A CAUTIOUS APPLICATION OF TITLE VII SEXUAL HARASSMENT STANDARDS IN A PRIMARY SCHOOL SETTING. ....	14
IV. CONCLUSION .....	16

## TABLE OF AUTHORITIES

Case	Page(s)
<i>Arkansas Educational Television v. Forbes</i> , Sup.Ct. No. 96-779 (October Term, 1996) .....	2
<i>Baker v. Weyerhaeuser Co.</i> , 903 F.2d 1342 (10th Cir. 1990) .....	11
<i>Barrett v. Omaha Nat'l Bank</i> , 726 F.2d 424 (8th Cir. 1984) .....	11
<i>Brown v. Hot, Sexy &amp; Safer Productions</i> , 68 F.3d 525 (1st Cir. 1995) .....	3
<i>Bundy v. Jackson</i> , 641 F.2d 934 (1981) .....	9
<i>Burlington Industries, Inc. v. Ellerth</i> , ___ U.S. ___ (Sup.Ct. No. 97-569, June 26, 1998) .....	10, 12
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979) ..	4, 5, 7
<i>Davis v. Monroe County Bd. of Educ.</i> , 120 F.3d 1186 (11th Cir. 1997) .....	3, 6, 7, 16
<i>DeGrace v. Rumsfeld</i> , 614 F.2d 796 (1st Cir. 1980) ...	8, 15
<i>Faragher v. City of Boca Raton</i> , ___ U.S. ___ (Sup.Ct. No. 92-282, June 26, 1998) .....	10, 12
<i>Franklin v. Gwinnett County Pub. Schs.</i> , 503 U.S. 60 (1992) .....	3, 5, 6, 13-15

<i>FSB v. Vinson</i> , 477 U.S. 57 (1986) .....	3
<i>Gebser v. Lago Vista Indep. Sch. Dist.</i> , 524 U.S. ___, Sup.Ct. No. 96-1866 (June 22, 1998) .....	3, 6, 14, 15
<i>Grove City College v. Bell</i> , 465 U.S. 555 (1984) .....	4, 5
<i>Grove City College v. Harris</i> , 687 F.2d 684 (3rd Cir. 1982) .....	5
<i>Harris v. Forklift Systems</i> , 510 U.S. 17 (1993) .....	10
<i>Henson v. City of Dundee</i> , 682 F.2d 897 (1982) ...	8-10, 12
<i>Huddleston v. Roger Dean Chevrolet</i> , 845 F.2d 900 (11th Cir. 1988) .....	11
<i>Katz v. Dole</i> , 709 F.2d 251 (4th Cir. 1983) .....	11, 12
<i>Lipsett v. University of Puerto Rico</i> , 864 F.2d 881 (1st Cir. 1988) .....	3
<i>Los Angeles Dept. of Water and Power v. Manhart</i> , 435 U.S. 702 (1978) .....	10
<i>Meritor Savings Bank v. Vinson</i> , 477 U.S. 57 (1986) ..	3, 6, 9-12
<i>North Haven Bd. of Educ. v. Bell</i> , 456 U.S. 512 (1982) ..	4, 5
<i>Oncale v. Sundowner</i> , ___ U.S. ___, Sup.Ct. No. 96-568, March 4, 1998 .....	11



<i>Rabidue v. Osceola Ref. Co.</i> , 805 F.2d 611 (6th Cir. 1986)	11
<i>Rogers v. EEOC</i> , 454 F.2d 234 (5th Cir. 1971)	8-10
<i>Steele v. Offshore Shipbldg.</i> , 867 F.2d 1311 (11th Cir. 1989)	16
<i>Swentek v. USAir</i> , 830 F.2d 552 (4th Cir. 1987)	16
<i>Trent v. Valley Electric Ass'n</i> , 41 F.3d 524 (9th Cir. 1994)	13
<i>United States v. Price</i> , 383 U.S. 787 (1966)	5
<i>Waltman v. International Paper Co.</i> , 875 F.2d 468 (5th Cir. 1989)	11, 13

### Statutes, Regulations and Rules

Equal Employment Opportunity Commission Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(d)	11-13
Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681	<i>passim</i>
Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-2(a)(1)	<i>passim</i>

### Other Sources

B. Lindemann & D. Kadue, Sexual Harassment in

<u>Employment Law</u> (1992), at p. 30	<i>passim</i>
J. Cook and J. Sobieski, Jr., <u>Civil Rights Actions</u> , Vol. 4	5
Restatement (Second) of Agency, §§ 219-237 (1958)	12

No. 97-843

---

In The  
**SUPREME COURT OF THE UNITED STATES**  
October Term, 1998

---

**AURELIA DAVIS,**  
**AS NEXT FRIEND OF LASHONDA D.,**  
*Petitioner,*  
v.

**MONROE COUNTY BOARD OF**  
**EDUCATION, ET AL.,**  
*Respondent.*

---

On Writ of Certiorari to the  
United States Court of Appeals for the Eleventh Circuit

---

**BRIEF AMICUS CURIAE IN SUPPORT OF**  
**PETITIONER AURELIA DAVIS**

---

TO THE HONORABLE CHIEF JUSTICE AND  
ASSOCIATE JUSTICES OF THE SUPREME COURT OF  
THE UNITED STATES:



## I. STATEMENT OF AMICUS CURIAE INTEREST AND INTRODUCTION<sup>1</sup>

The Rutherford Institute is a non-profit organization established in 1982 and based in Charlottesville, Virginia, providing legal services nationwide in defense of civil and religious liberties. Attorneys affiliated with the Institute have appeared numerous times before this Court on such matters, most recently as counsel of record for Respondent in *Arkansas Educational Television v. Forbes*, Sup.Ct. No. 96-779 (October Term, 1996).

## II. SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972, codified at 20 U.S.C. § 1681, provides in pertinent part that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." For purposes of this title, "educational institution" is defined to include "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education . . . ." 20 U.S.C. § 1681(c).

This Court on two occasions has unequivocally found that the proscriptions against sex discrimination in education established in Title IX provide a private right of action against sexual harassment perpetrated by a faculty member. See

---

<sup>1</sup> The parties have consented to the filing of this brief. Counsel for the Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

*Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. \_\_\_, Sup.Ct. No. 96-1866 (June 22, 1998).

The Court is now called upon to determine whether Title IX, properly construed, provides a student with the same federal legal protections against peer sexual harassment discrimination in her place of learning as it affords to an employee in her place of work.<sup>2</sup> *Amicus curiae* The Rutherford Institute respectfully suggests that Title IX does under the circumstances presented to the Court -- where the plaintiff has made a *prima facie* demonstration that school authorities knowingly disregarded a student's subjection to pervasive sexual conduct that "unreasonably interfer[ed] with [her] work or performance or creat[ed] an intimidating, hostile, or offensive [educational] environment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

## III. ARGUMENT

### A. A CONSTRUCTION OF TITLE IX TO PROHIBIT ALL FORMS OF SEXUAL HARASSMENT IN EDUCATION IS MOST CONSISTENT WITH THIS COURT'S

---

<sup>2</sup> See *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1186, 1412 (11th Cir. 1997), *en banc*, (Barkett, Cir. Judge, dissenting, citing *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. at 74-75). "Title VII, and thus Title IX, 'strike at the entire spectrum of disparate treatment of men and women,' including conduct having the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile or offensive environment." *Brown v. Hot, Sexy & Safer Productions*, 68 F.3d 525, 540 (1st Cir. 1995), quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986). Accord *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 899 (1st Cir. 1988).

## HOSTILE ENVIRONMENT JURISPRUDENCE UNDER BOTH TITLE IX AND TITLE VII.

The *en banc* Eleventh Circuit's strict construction of the scope of Title IX's prohibition on sexual harassment discrimination in education is at odds with the Supreme Court's well-developed racial and sexual harassment jurisprudence under both Title IX and Title VII of the 1964 Civil Rights Act. 42 U.S.C. §§ 2000e-2(a)(1). In holding that Title IX provides an implied private right of redress for gender discrimination in federally-funded education programs, the Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), relied heavily on its conclusion that Congress patterned Title IX after Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of "race, color, or national origin" in language and provisions substantially identical to those of Title IX. *Id.* at 695-96; accord *Grove City College v. Bell*, 465 U.S. 555, 566 (1984); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 514 (1982). Since Title VI had already been construed to provide an implied private right of action when Title IX was adopted in 1972, it seemed evident to the Court that "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been [to include a private cause of action] . . . ." *Cannon*, 44 U.S. at 696. In so determining, the Court expressly rejected the "strict construction of the remedial aspect of [Title IX]" applied by the court of appeals in holding no implied private remedy existed. *Id.* at 698.

The Court continued its broad and amelioratory reading of Title IX in *North Haven Bd. of Educ. v. Bell*, *supra*, and *Grove City College*, *supra*. Ruling contrary to the opinions of a majority of the circuit courts of appeal which had considered

the issue,<sup>3</sup> *North Haven* upheld the former Department of Health, Education and Welfare's "Subpart E" Title IX regulations, which had extended the proscription on discrimination to employment practices. 456 U.S. at 516, citing 34 C.F.R. 106.51-106.61(1980). The *North Haven* Court reiterated, "There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" 456 U.S. at 521, quoting *United States v. Price*, 383 U.S. 787, 801 (1966). Similarly, the *Grove City* Court declined to hold § 901(a) of the Act inapplicable to institutions that received federal funds only indirectly through student educational grants. The Court agreed that the Act "appears to encompass all forms of federal aid to education, direct or indirect,"<sup>4</sup> and so held in keeping with *North Haven's* mandate to accord the Act a broad interpretation. 465 U.S. at 564.

Sexual harassment claims under Title IX developed along similar lines as an expression of the Court's expansive interpretation to accomplish all the Act's objectives. In *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), the Court unanimously concurred in holding, first, that the private right of action recognized in *Cannon* entitles a prevailing plaintiff to a damages remedy; and second, that the right of action permits redress of a hostile educational environment created by a teacher. 503 U.S. at 75. In reaching

---

<sup>3</sup> The First, Sixth, Eighth and Ninth Circuits had held that Title IX coverage did not extend to discrimination in employment, while the Second and Fifth had held that it did. See generally, cases cited in J. Cook and J. Sobieski, Jr., *Civil Rights Actions*, Vol. 4, § 17.20, at 17-31, nn.2,3.

<sup>4</sup> *Id.* at 564, quoting *Grove City College v. Harris*, 687 F.2d 684, 691 (3rd Cir. 1982).



this conclusion, the Court harkened back to *Meritor*:

Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s] on the basis of sex.' We believe the same rule should apply when a teacher sexually harasses and abuses a student.

*Id.*, quoting *Meritor*, 477 U.S. at 64 [citation in text omitted]. The Court so held because it viewed sexual harassment as one of the "intentional actions [Congress] sought by statute to proscribe." *Id.*

The Court continued to construe the statute broadly in the most recent term in *Gebser v. Lago Vista Independent Sch. Dist.*, although it found that the notice requirement imposed by spending clause precedent precluded the application of agency principles of liability based upon *respondeat superior* or constructive notice. Slip op. at 9. In so holding, the Court was concerned only with limiting the scope of school board liability in cases where they have no knowledge of the alleged harassment (which is not the factual predicate before the Court), and not with revisiting its view that Title IX was intended to prohibit all forms of intentional sex discrimination.

In contrast with this Court's approach to determining the scope of Title IX liability is the *en banc* Eleventh Circuit's opinion. Noting that the Supreme Court "has not squarely addressed the issue of student-student sexual harassment," *Davis*, 120 F.3d at 1395, the appeals court went on to inordinately circumscribe the intent of *Franklin*. The court's syllogism is revealing: First, the court observed that "[i]n

general, the [Supreme] Court has allowed private plaintiffs to proceed under Title IX only in cases that allege institutional gender discrimination by the administrators of educational institutions." *Id.* Of course, this Court has not so held, since it has not yet spoken to sexual harassment discrimination perpetrated by peers but acquiesced in by administrators. Second, the Eleventh Circuit opinion observes that neither the Supreme Court nor the Eleventh Circuit has held a school board liable for its failure to prevent non-employees from discriminating against students on the basis of sex, an observation that, while accurate, did not materially advance the issue before the court. *Id.* Finally, the court determined to "examine the legislative history of Title IX to determine whether Congress intended this provision to reach appellant's allegations." *Id.* *Amicus* respectfully suggests that this decision to look to legislative history, rather than the already developed federal law of racial and sexual harassment, led the court down a blind alley to a conclusion that is in conflict with nearly two decades of federal sexual harassment jurisprudence.

The *en banc* Eleventh Circuit majority opinion is rather disingenuous in stressing that in passing Title IX, the Congress did not consider student on student sexual harassment. *Davis*, 120 F.3d at 1396-97. The Congressional debate did not consider the issue of sexual harassment in educational programs at all, for the federal law of sexual harassment under Title VII was not to develop until after both the passage of Title IX in 1972 and the *Cannon* decision in 1979 affording a private right of action for victims of prohibited sex discrimination under Title IX. See generally B. Lindemann & D. Kadue, Sexual Harassment in Employment Law (1992), at 30 ("In 1980, no court had yet held that a sexually hostile environment, involving no tangible job detriment, was actionable.") Nonetheless, the development of federal sexual harassment

law, like that of racial harassment law before it, reflects a clear intent to include all forms of hostile environment harassment, including peer harassment.

In the Eleventh Circuit's seminal sexual harassment decision in *Henson v. City of Dundee*, 682 F.2d 897 (1982), the court found that allegations of supervisor harassment of a police dispatcher were sufficient for a *prima facie* showing of discrimination under Title VII without proof that the employee suffered tangible job detriment. 682 F.2d at 901.<sup>5</sup> Although *Henson* was a case of supervisor harassment, the court made no distinction on that basis. The court drew from the well-developed body of case law that co-workers can create a racially hostile work environment,<sup>6</sup> principally *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), to determine that:

[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

---

<sup>5</sup> Title VII renders it unlawful for any public or private employer with more than fifteen employees to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. §§ 2000e-2(a)(1).

<sup>6</sup> "Employer liability for unchecked racial harassment by co-workers was well-established by 1980, when the First Circuit decided *DeGrace v. Rumsfeld* [614 F.2d 796 (1st Cir. 1980)]." Lindemann and Kadue, *supra*, at 236-37.

*Henson*, 682 F.2d at 902. When "seek[ing] to hold the employer responsible for the hostile environment created by the plaintiff's supervisor *or co-worker*," the court stated, a Title VII claimant must show the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *Id.* at 905 [emphasis added].

The court referenced numerous cases involving allegations of co-worker racial harassment. *Id.*, at n.4. The court also stated that it was also "bolstered in [its] conclusion" by the D.C. Circuit Court's decision in *Bundy v. Jackson*, 641 F.2d 934 (D.C.Cir. 1981), which had held the year earlier that the equation of sex discrimination with a hostile work environment caused by sexual harassment "follows ineluctably from numerous cases finding Title VII violations where an employer *created or condoned* a substantially [racially] discriminatory environment . . . ." *Henson*, 682 F.2d at 902, quoting *Bundy v. Jackson*, 641 F.2d at 943-44 [emphasis added]. Hence, it is apparent that both the law of racial harassment and the then-nascent law of sexual harassment contemplated the creation of a hostile work environment by an employer who knows of an abusive environment inflicted by a claimant's co-workers but fails to take corrective action.

By 1986, the Supreme Court was able to unanimously concur in *Meritor v. Vinson*, that a right of action existed for sexual harassment as a form of sex discrimination under Title VII. The Court did so by first observing that sexual harassment was a type of gender-based discrimination: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." 477 U.S. at 64. The Supreme Court next rejected the argument that in passing the 1964 Civil Rights Act, Congress was concerned only with "tangible losses of an



economic character" and not "purely psychological aspects of the workplace environment." *Id.* The Court stated that "[t]he phrase, 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."<sup>7</sup> The Court concluded by quoting the now-familiar language of *Henson v. Dundee* denouncing the "requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living" created by a hostile work environment.<sup>8</sup> *Meritor*, like *Henson*, expressly approved the incorporation of the line of authority relating to racial harassment in a co-worker setting. *Meritor*, 477 U.S. at 65-66.

The Court in *Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993), affirmed that compensation for subjective emotional distress is recoverable under Title VII in the context of hostile work environment claims by recognizing that "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Id.* at 22. The Court once again cited *Rogers v. EEOC* with approval. *Id.*

The Supreme Court's recent companion opinions in *Burlington Industries, Inc. v. Ellerth*, \_\_\_ U.S. \_\_\_ (Sup.Ct. No. 97-569, June 26, 1998) and *Faragher v. City of Boca Raton*,

---

<sup>7</sup> *Id.*, quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978)[cites omitted in text].

<sup>8</sup> *Meritor*, at 67, quoting *Henson v. Dundee*, *supra*, 682 F.2d at 902.

\_\_\_ U.S. \_\_\_ (Sup.Ct. No. 97-282, June 26, 1998), and its decision in *Oncale v. Sundowner*, \_\_\_ U.S. \_\_\_, Sup.Ct. No. 96-568 (March 4, 1998) furthered the broad scope of hostile environment liability. Notably, *Oncale* held that Title VII's prohibition on discrimination "because of sex" "must extend to sexual harassment of any kind that meets the statutory requirements [of altering "terms and conditions" of employment]." Slip op. at 4.

Although early Title VII decisions sometimes held that co-workers cannot create a hostile work environment because they lack the authority to alter the terms and conditions of a complainant's employment,<sup>9</sup> it is now established beyond dispute that a hostile work environment cause of action exists for severe or pervasive co-worker harassment. *E.g.*, *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342 (10th Cir. 1990); *Huddleston v. Roger Dean Chevrolet*, 845 F.2d 900 (11th Cir. 1988); Lindemann and Kadue, *supra*, at 237. Several of the circuit courts adopted this co-worker rule even prior to *Meritor*. The Equal Employment Opportunity Commission Guidelines on Sexual Harassment address co-worker harassment as follows:

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

---

<sup>9</sup> See Lindemann and Kadue, *supra*, at 236.

29 C.F.R. § 1604.11(d). *Accord Burlington Industries, Inc. v. Ellerth, supra; Faragher v. Boca Raton, supra.*

The Eleventh Circuit was also misguided in relying on its perception that the agency principles of Title VII have no relevance to the issue before it. 120 F.3d at 1400, n.13.<sup>10</sup> "Courts now recognize that the formal authority of the harasser does not control whether the harassment had made the complainant's environment so hostile, offensive, or intimidating as to alter the terms and conditions of work." Lindemann and Kadue, *supra* at 236. In employment cases, this rule is sometimes expressed to establish liability where a supervisor's failure to respond rises to the level of ratification, making peer harassment tantamount to harassment by those in authority.<sup>11</sup> "The capacity of any person to create a hostile or offensive work environment is not necessarily enhanced or diminished by any degree of authority which the employer confers on the individual." *Henson v. City of Dundee*, 682 F.2d at 910.

---

<sup>10</sup> The Court in *Meritor* declined to adopt a rule that would render employers automatically liable for sexual harassment by their supervisors in a hostile work environment cause of action, instead directing lower courts to consult agency principles for guidance on the issue of employer liability. *Meritor*, 477 U.S. at 65. The *Meritor* Court recommended that the lower courts refer to §§ 219-237 of the Restatement of Agency. These sections are found in Chapter Seven, Topic Two, Title B of the Restatement entitled, "Liability of Principal to Third Persons - Liability for Authorized Conduct or Conduct Incidental Thereto - Torts of Servants." Restatement (Second) of Agency §§ 219-237 (1958).

<sup>11</sup> See, e.g., *Katz v. Dole*, 709 F.2d 251, 255 n.6 (4th Cir. 1983) ("Where, as here, the employer's supervisory personnel manifested unmistakable acquiescence in or approval of the harassment, the burden on the employer seeking to avoid liability is especially heavy."); see generally Lindemann and Kadue, at 234.

In keeping with this rule, an employer may be liable for a hostile work environment under Title VII despite that the environment was not created by its employees or agents.<sup>12</sup> In such cases, "[w]here employers can control the conduct of nonemployees, the analysis strongly resembles that used in determining employer liability for co-worker harassment." Lindemann and Kadue, at 250-51. See, e.g., *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989); *Trent v. Valley Electric Ass'n*, 41 F.3d 524 (9th Cir. 1994). See generally, Lindemann and Kadue, *supra* 1997 Supp. at 73-76.

In this regard, the *en banc* Eleventh Circuit's talismanic fixation on the lack of an agency relationship between school officials and students and the fact that students do not act on the school's authority is directly counter to the historical development and current state of federal anti-discrimination law.

Since *Franklin*, then, this Court has unanimously concurred in the view that some form of liability exists in Title IX cases, but has not demarcated in either its Title VII or its Title IX analyses between a hostile environment created by a person in authority - such as an administrator or faculty member - and one created by the intentional acquiescence of those in authority with peer sexual harassment. In light of the cohesive development of Title VII sexual harassment law without regard to the source of a hostile environment, no principled distinction may be drawn between a supervisor-

---

<sup>12</sup> See generally, Lindemann and Kadue, *supra* Chapter 8, at 246 *et seq.*, "Harassment by Nonemployees". The EEOC guidelines provide for employer liability for nonemployee conduct "where the employer (or its agents or supervisory employees) knows or should have known of the conduct, and fails to take immediate and appropriate corrective action." 29 C.F.R. § 1604.11(e). However, the extent of the employer's control over the conduct, among other factors, is considered. *Id.*



created hostile environment and a peer-created hostile environment in federal sexual harassment law. For the Court now to draw such a distinction would redirect the course of federal sexual harassment jurisprudence into uncharted waters, where no guiding principles would be available to enable school administrators to distinguish between an atmosphere of sexual intimidation inflicted upon a student by an administrator or faculty member, for which liability will be imposed, see *Franklin*, *Gebser*, and an equally intimidating atmosphere created or facilitated by the complicity of the same adults in the hostile sexual conduct of fellow students. Title IX was clearly phrased to strike at all discrimination perceived from the point of view of victims of harassment, having been written in the subject-neutral voice to mandate that "[n]o person . . . shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. Sec. 1681. To now read into the Act an intention to restrict liability to instances where school authorities themselves create the discriminatory environment is to unduly restrict its application to the point of frustrating its purpose.

**B. A RULE OF REASON IN THE INSTANT CASE SUGGESTS A CAUTIOUS APPLICATION OF TITLE VII SEXUAL HARASSMENT STANDARDS IN A PRIMARY SCHOOL SETTING.**

While the *en banc* Eleventh Circuit repeatedly expressed reservations about the efficacy of importing Title VII hostile work environment principles into the educational setting, the facts of the case before the Court perfectly satisfy the requirements for vicarious liability under Title IX set forth in this Court's recent opinion in *Gebser v. Lago Vista*

*Independent Sch. Dist.*, *supra*. The *Gebser* majority opinion explained that a damages remedy against a recipient of Title IX funds is appropriate where "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Id.*, Slip op. at 15. Unlike the plaintiff in *Gebser*, who informed no school officials about the sexual harassment she suffered, the petitioner in this case alleges ample facts to satisfy this "deliberate indifference" standard.

Thus, the Monroe County school officials had actual notice that a student in their school was "on the basis of sex, be[ing] excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under [an] education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The officials chose to take no action, thereby ratifying G.F.'s harassing conduct. As the First Circuit observed in *DeGrace v. Rumsfeld*, in the context of racial harassment, "more than mere verbal chastisements of those . . . who [use] racial epithets was needed in order . . . forcefully to convey the message that racism would not be tolerated." 614 F.2d at 805. To paraphrase that court, while a school official "cannot change the personal beliefs of his [students] he can let it be known . . . that [sexual] harassment will not be tolerated, and he can take all reasonable measures to enforce this policy." *Id.* at 805. Just as in *Franklin v. Gwinnett County*, *supra*, the plaintiff in this case is entitled to monetary damages under an implied private right of action for the school administrator's lack of corrective action.

Judge Tjoflat separately expressed his view in the *en banc* Eleventh Circuit opinion that "[p]hysical separation of the

alleged harasser from other students is the only way school boards can ensure that they cannot be held liable for future acts of harassment," *Davis*, 120 F.3d at 1402. Such a drastic response, Judge Tjoflat reasoned, would put schools in an impossible dilemma every time they received an allegation of student-on-student harassment. However, this alarm is unnecessary.

In Title VII caselaw, suspension of the harasser is not the only, or even the preferred response to allegations of sexual harassment. Employers have been absolved from liability where they took prompt remedial action reasonably calculated to deter future harassment. *See, e.g., Steele v. Offshore Shipbldg.*, 867 F.2d 1311 (11th Cir. 1989)(employer not liable where, after prompt reprimand, harassment stopped); *Swentek v. USAir*, 830 F.2d 552 (4th Cir. 1987)(written warning was adequate remedial action by employer). Some alternative remedies to firing include temporary transfer pending the outcome of the investigation; offering counselling to the harasser and victim; oral and written warnings; suspensions and demotions; and transfers, reassignments, and restructuring of the environment. *See generally* Lindemann and Kadue, *supra* Chap. 19 (1992 Volume and 1997 Supp.) and cases cited therein.

### III. CONCLUSION

The Court's *amicus* respectfully suggests that the best means of ensuring that employers and employees will take seriously the proscriptions against discriminatory workplace conditions and respect the dignity of their co-workers is to have those proscriptions instilled into them as part of the educational process. If teachers and school administrators knowingly fail to protect students in their care from sexual harassment which

officials have the power to stop, they invite liability under their Title IX contractual obligations. Perhaps more importantly, they condition students at a young age to accept sexual harassment as inevitable, and to view reporting harassment as futile.

For the reasons set forth above, *amicus curiae* The Rutherford Institute respectfully suggests that the judgment of the *en banc* Eleventh Circuit Court of Appeals be reversed and the case remanded to permit Petitioner to proceed on her Title IX claim.

Respectfully submitted,

John W. Whitehead  
Steven H. Aden  
Kimball E. Hazelwood  
THE RUTHERFORD INSTITUTE  
1445 East Rio Road  
Charlottesville, Virginia 22901  
(804) 978-3888

November 10, 1998



18

Supreme Court, U.S.

FILED

NOV 10 1998

CLERK

No. 97-843

In The  
Supreme Court of the United States  
OCTOBER TERM, 1998

AURELIA DAVIS, as next friend of LASHONDA D.,  
*Petitioner,*

v.

MONROE COUNTY BOARD OF EDUCATION, et al.,  
*Respondents*

On Writ of Certiorari to the United States  
Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION,  
NATIONAL ASSOCIATION OF SOCIAL WORKERS,  
ILLINOIS COALITION AGAINST SEXUAL ASSAULT,  
DR. LARRY BENNETT, DR. SUSAN FINERAN,  
DR. LOUISE FITZGERALD, DR. SANDRA M. GORDON,  
(Additional *Amici Curiae* listed on inside cover)  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JUDITH L. LICHTMAN  
DONNA R. LENHOFF\*  
\* *Counsel of Record*  
JOCELYN C. FRYE  
SANDHYA L. SUBRAMANIAN

National Partnership for Women & Families  
1875 Connecticut Avenue, N.W., Suite 710  
Washington, D.C. 20009  
(202) 986-2600

*Counsel for Amici Curiae*

November 10, 1998



RECEIVED  
NOV 10 1998 12:43  
SUPREME COURT, U.S.  
CLERK'S OFFICE

49pp

KARETTA HUBBARD,  
MELISSA JOSEPHS,  
SENATOR JEANNE KOHL,  
NANCY B. KREITER,  
ELEANOR LINN,  
DR. BERNICE LOTT,  
CARL MOORE,  
LYNNE REVO-COHEN,  
DR. BERNICE R. SANDLER,  
SUE SATTEL,  
KAREN D. SCHWARTZROCK,  
DR. CHAROL SHAKESHAFT,  
DR. ROBERT J. SHOOP,  
DR. NAN STEIN,  
SUSAN STRAUSS,  
MARGARET WEEKS



## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	iii
INTEREST OF AMICI CURIAE .....	1
SUMMARY OF ARGUMENT .....	1
STATEMENT .....	2
INTRODUCTION .....	2
ARGUMENT .....	3
I. Recognizing a Cause of Action for Peer Sexual Harassment Will Not Unduly Burden Schools .....	3
A. Requiring Schools To Take Appropriate Steps to Remedy Peer Sexual Harassment Imposes Reasonable Obligations on Schools .....	5
B. Schools Routinely Handle a Wide Range of Disciplinary Matters and Have Adequate Existing Mechanisms For Addressing Peer Sexual Harassment Complaints .....	9

C.	A Large Body of Educational Expertise Confirms That Schools Have Abundant Options For Responding To Peer Sexual Harassment Complaints . . . . .	11
II.	Schools Can Fulfill Their Obligations to Students Who Have Been Sexually Harassed Without Jeopardizing Their Legal or Financial Position . . . . .	16
	CONCLUSION . . . . .	22
	APPENDIX . . . . .	A-1

# TABLE OF AUTHORITIES

## Page(s)

## CASES

<u>Aetna Life Ins. Co. v. LaVoie</u> , 475 U.S. 813 (1986) . . . . .	17
<u>Bator v. Hawaii</u> , 39 F.3d 1021 (9th Cir. 1994) . . . . .	19
<u>Bethel Sch. Dist. No. 403 v. Fraser</u> , 478 U.S. 675 (1986) . . . . .	10
<u>Bohen v. City of East Chicago</u> , 799 F.2d 1180 (7th Cir. 1986) . . . . .	19-20
<u>Bruneau v. South Kortright Cent. Sch. Dist.</u> , 935 F. Supp. 162 (N.D.N.Y. 1996) . . . . .	7
<u>Brzonkala v. Virginia Polytechnic Inst. &amp; State Univ.</u> , 132 F.2d 949 (4th Cir. 1997), <u>vacated and reh'g</u> <u>en banc granted</u> , Nos. 96-1814, 96-2316 (4th Cir. Feb. 5, 1998) . . . . .	6
<u>City of Los Angeles v. Manhart</u> , 435 U.S. 702 (1978) . . . . .	21
<u>Cleveland Bd. of Educ. v. Loudermill</u> , 470 U.S. 532, 538-46 (1985) . . . . .	20
<u>Cohen v. Brown Univ.</u> , 991 F.2d 888 (1st Cir.1993) . . . . .	4



<u>Collier v. William Penn. Sch. Dist.</u> , 956 F. Supp. 1209 (E.D. Pa. 1997) . . . . .	7
<u>Cooper v. Baldwin County Sch. Dist.</u> , 386 S.E.2d 896 (Ga. Ct. App. 1989) . . . . .	19
<u>Davis v. Monroe County Board of Education</u> , 120 F.3d 1390 (11th Cir. 1997) (en banc), <u>cert. granted in part</u> , 66 U.S.L.W. 3387, 67 U.S.L.W. 3186 (U.S. Sept. 29, 1998) (No. 97-843) . . . . .	3, 4, 7, 8, 9, 11, 12, 16, 18, 19, 20
<u>Doe v. Oyster River Coop. Sch. Dist.</u> , 992 F. Supp. 467 (D.N.H. 1997) . . . . .	7-8
<u>Doe v. Petaluma Sch. Dist.</u> , 949 F. Supp. 1415 (N.D. Cal. 1996) . . . . .	7
<u>Doe v. University of Ill.</u> , 138 F.3d 653 (7th Cir. 1998), <u>petition for cert. filed</u> , 67 U.S.L.W. 3083 (U.S. Jul. 13, 1998) (No. 98-126). . . . .	6, 7, 8, 18
<u>Franklin v. Gwinnett County Public Schools</u> , 503 U.S. 60 (1992) . . . . .	18
<u>Franks v. Kentucky Sch. For the Deaf</u> , 956 F. Supp. 741 (E.D. Ky. 1996), <u>aff'd</u> , 142 F.3d 360 (6th Cir. 1998) . . . . .	7
<u>Gebser v. Lago Vista Indep. Sch. Dist.</u> , 118 S. Ct. 1989 (1998) . . . . .	21
<u>Goss v. Lopez</u> , 419 U.S. 565 (1975) . . . . .	10, 17

<u>Hatch v. Goerke</u> , 502 F.2d 1189 (10th Cir. 1974) . . . . .	17
<u>Hazelwood Sch. Dist. v. Kuhlmeier</u> , 484 U.S. 260 (1988) . . . . .	10
<u>Ingraham v. Wright</u> , 430 U.S. 651 (1977) . . . . .	10
<u>Jenkins v. Louisiana State Bd. of Educ.</u> , 506 F.2d 992 (5th Cir. 1975) . . . . .	17
<u>Mockler v. Multnomah County</u> , 140 F.3d 808 (9th Cir. 1998) . . . . .	8
<u>Monteiro v. Tempe Union High Sch. Dist.</u> , No. 97-15511, 1998 WL 727338 (9th Cir. Oct. 19, 1998) . . . . .	7, 18
<u>New Jersey v. T.L.O.</u> , 469 U.S. 325 (1985) . . . . .	10
<u>Nicole M. v. Martinez Unified Sch. Dist.</u> , 964 F. Supp. 1369 (N.D. Cal. 1997) . . . . .	6-7
<u>Oona R.-S. v. McCaffrey</u> , 143 F.3d 473 (9th Cir. 1998), <u>amended on denial of reh'g</u> , No. 95-16046, 1998 WL 216944 (9th Cir. May 5, 1998), <u>petition for cert. filed</u> , 67 U.S.L.W. 3083 (U.S. Jun. 19, 1998) (No. 98-101) . . . . .	6, 12
<u>Rowinsky v. Bryan Indep. Sch. Dist.</u> , 80 F.3d 1006 (5th Cir.), <u>cert.denied</u> , 117 S.Ct. 165 (1996) . . . . .	7
<u>Tinker v. Des Moines Indep. Community Sch. Dist.</u> , 393 U.S. 503 (1969) . . . . .	9-10

<u>Udall v. Tallman</u> , 380 U.S. 1 (1965) . . . . .	4
<u>Vanelli v. Reynolds Sch. Dist.</u> , 667 F.2d 773 (9th Cir. 1982) . . . . .	18
<u>Vernonia Sch. Dist. 47J v. Acton</u> , 515 U.S. 646 (1995) . . . . .	9, 10

### STATUTES AND REGULATIONS

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-1688 . . . . .	1, 18
29 U.S.C. § 621 (Age Discrimination in Employment Act) . . . . .	22
42 U.S.C. § 1983 . . . . .	18
Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d <u>et seq.</u> . . . . .	18, 21-22
Title VII of the Civil Rights Act of 1964), 42 U.S.C. § 2000e <u>et seq.</u> . . . . .	8, 21
42 U.S.C. § 12101 (Americans with Disabilities Act) . . . . .	22
Ga. Code Ann. § 20-2-155(a), (b) (1996) . . . . .	11
Ga. Code Ann. § 20-2-1185 (a) . . . . .	10-11
Ga. Code Ann. § 20-2-751.3 (Supp. 1998) . . . . .	10
29 C.F.R. § 1604.11(e) . . . . .	19

34 C.F.R. § 106.8(b) . . . . .	13
Department of Education Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, 62 Fed. Reg. 12,034, 12,039, 12,042, (1997) ("OCR Guidance"). . . . .	3-4, 5, 5-6, 7, 11, 12, 13, 16

### MISCELLANEOUS

Susan Fineran, <u>Gender and Power Issues of Peer Sexual Harassment Among Teenagers</u> , 14 Journal of Interpersonal Violence (forthcoming May 1999) (manuscript on file with author) . . . . .	2
Pam Hillesheim-Setz et al., <u>"Be A Sport": What You Need to Know About Sexual Harassment</u> (1994) .	14
Eleanor Linn et al., <u>Bitter Lessons for All: Sexual Harassment in Schools</u> , in <u>Sexuality and the Curriculum: The Politics and Practices of Sexuality Education</u> 106 (James T. Sears ed., 1992) . . . . .	12
Eleanor Linn, Hamilton Fish Nat'l Inst. on Sch. & Community Violence, <u>Effectiveness of Existing Programs and Approaches for Reducing Sexual Harassment and Sexual Violence in School</u> (forthcoming Dec. 1998) (manuscript on file with author) . . . . .	14
<u>Michigan Middle School Students Craft Sexual Harassment Policy For Their School</u> , Educator's Guide to Controlling Sexual Harassment,	



Nov. 1998 .....	13-14
Minnesota Dep't of Educ., <u>Sexual Harassment to Teenagers: It's Not Fun/It's Illegal: A Curriculum for Identification and Prevention of Sexual Harassment for Use With Junior and Senior High School Students</u> (rev. ed. 1996) .....	14
Kathryn Wells Murdock & David Kysilko, National Ass'n of State Bds. of Educ., <u>Sexual Harassment in Schools: What It Is, What To Do</u> (David Kysilko ed., 1993) .....	6, 14-15
Sue Sattel, <u>Sexual Harassment in Schools: A Guide to Prevention, Intervention, and Investigation</u> (Jamie Whaley ed. 1996). ....	15, 19
Robert J. Shoop, <u>Sexual Harassment Prevention: A Guide for School Leaders</u> 58 (1997) .....	12, 13, 14, 19
Robert J. Shoop & Debra L. Edwards, <u>How to Stop Sexual Harassment in Our Schools: A Handbook and Curriculum Guide for Administrators and Teachers</u> (1994) .....	12, 15, 17, 20
Lisa Sjostrom & Nan Stein, <u>Bullyproof: A Teacher's Guide on Teasing and Bullying For Use With Fourth and Fifth Grade Students</u> (1996) .....	13

Nan Stein, <u>Sexual Harassment in School: The Public Performance of Gendered Violence</u> , 65 Harvard Educ. Rev. 145 (1995) .....	3, 16, 20
Nan Stein & Lisa Sjostrom, National Educ. Ass'n Prof'l Library, <u>Flirting or Hurting? A Teacher's Guide on Student-to-Student Sexual Harassment in Schools (Grades 6 Through 12)</u> (1994) .....	15
Susan Strauss et al., <u>Girls and Boys Getting Along: Teaching Sexual Harassment Prevention in the Elementary Classroom - Includes Grades K-3 and 4-6 Curricula</u> (rev. ed. 1997) .....	15
Susan Strauss & Pamela Espeland, <u>Sexual Harassment and Teens: A Program for Positive Change</u> (1992) .....	15
Thompson Publ'g Group, <u>Educator's Guide to Controlling Sexual Harassment</u> (1994) .....	15
United States Merit Sys. Protection Bd., <u>Sexual Harassment in the Federal Workplace</u> (1995) ..	20-21
University of Ct. Sch. of Soc. Work, Permanent Comm'n on Status of Women, <u>In Our Own Backyard: Sexual Harassment in Connecticut's Public High Schools. Executive Summary</u> 2 (1995) .....	2, 6

## INTEREST OF AMICI CURIAE

Amici curiae are educators, researchers, and practitioners with a long history of researching gender-related issues in education; advising schools, teachers, and employers at all levels on how to address sexual harassment in schools and other institutional settings; and working to further the goals of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), to ensure equitable educational opportunities for all students. Background information on each of the amicj is set forth in the attached Appendix.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court.<sup>1</sup>

## SUMMARY OF ARGUMENT

Although peer sexual harassment has emerged as a persistent problem, schools are far from powerless to respond. Requiring schools to adopt prompt and appropriate measures to remedy peer sexual harassment offers a remedy to victims of sexual harassment, while leaving schools the freedom to tailor their response to the particular facts of each case. Schools routinely handle a wide range of disciplinary matters and have the institutional capacity to respond effectively without suffering undue

---

<sup>1</sup> This brief was authored by the amicj and counsel listed on the front cover of this brief, and was not authored in whole or in part by counsel for a party. No one other than the amicj and their counsel made any monetary contribution to the preparation or submission of this brief.



burdens. Furthermore, schools can draw on a multitude of educational resources to maximize the effectiveness of that response.

Holding schools accountable for their failure to respond to known sexual harassment neither traps schools in a double bind between alleged harassers and victims, nor sends schools spiraling toward financial ruin. A contrary result would threaten the future of all civil rights laws by permitting any public institution to invoke financial burdens to escape liability. Thus, recognizing a cause of action under Title IX for peer sexual harassment encourages schools to confront rather than protect discrimination.

### STATEMENT

Amici hereby adopt and incorporate by reference the Statement of Facts set forth in Petitioner's brief.

### INTRODUCTION

For schools, educators, and students across the country, peer sexual harassment has become a persistent problem<sup>2</sup> that increasingly requires schools to act. In the

---

<sup>2</sup> See, e.g., University of Conn. Sch. of Soc. Work, Permanent Comm'n on Status of Women, In Our Own Backyard: Sexual Harassment in Connecticut's Public High Schools, Executive Summary 2 (1995) (finding that 78% of high school students in Connecticut reported at least one experience of sexual harassment during high school years; noting that 76% of harassers were other students) [hereinafter In Our Own Backyard]; Susan Fineran, Gender and Power Issues of Peer Sexual Harassment Among Teenagers, 14 *Journal of Interpersonal Violence* (forthcoming May 1999) (manuscript at 8, on file with author) (reporting that 84% of students surveyed in large, urban Illinois high

decision below, the Eleventh Circuit Court of Appeals shields schools from liability for peer sexual harassment under Title IX of the Education Amendments of 1972, even in the most extreme cases where schools know about severe harassment but ignore it. Davis v. Monroe County Board of Education, 120 F.3d 1390 (11th Cir. 1997) (en banc), cert. granted in part, 66 U.S.L.W. 3387, 67 U.S.L.W. 3186 (U.S. Sept. 29, 1998) (No. 97-843). The decision contravenes important Department of Education policies and decisions of other courts, both of which direct schools to take prompt and appropriate action to remedy peer sexual harassment. By relieving schools of their responsibility to remedy known harassment, the decision takes a step backwards, allowing schools to be indifferent to complaints of sexual harassment between students -- an indifference that causes serious emotional and educational harm.<sup>3</sup>

### ARGUMENT

#### I. Recognizing a Cause of Action for Peer Sexual Harassment Will Not Unduly Burden Schools.

Schools have the institutional capacity to pursue a broad array of reasonable responses to sexual harassment, while adhering to their legal responsibility to respond immediately and appropriately, see Department of Education Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees,

---

school had experienced peer sexual harassment in school).

---

<sup>3</sup> See Nan Stein, Sexual Harassment in School: The Public Performance of Gendered Violence, 65 *Harvard Educ. Rev.* 145, 148-49, 156-57 (1995) [hereinafter Sexual Harassment in School].

Other Students or Third Parties, 62 Fed. Reg. 12,034, 12,039, 12,042 (1997) ("OCR Guidance").<sup>4</sup> Among the many available options are counseling or reprimanding the alleged harasser, adopting informal solutions to the problem, or imposing gradually escalating punishment. Thus, schools often need only resort to suspension or expulsion when other measures have failed.

In the decision below, a lone member of the majority<sup>5</sup> asserts that holding schools liable for failing to take appropriate steps to remedy known harassment would force schools to expel all accused harassers or risk potential liability.<sup>6</sup> This extreme view fundamentally misapprehends the guidelines of the Department of Education's Office for Civil Rights (the "OCR"), as well as federal case law.

Requiring schools to respond appropriately when they have notice of peer sexual harassment does not bind

---

<sup>4</sup> Courts have accorded "appreciable deference" to the Department of Education's interpretation of Title IX, Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993) ("Although [the Department of Education] is not a party to this appeal, we must accord its interpretation of Title IX appreciable deference."); see also Udall v. Tallman, 380 U.S. 1, 16 (1965) (observing that Supreme Court "gives great deference to the interpretation given the statute by the officers or agency charged with its administration").

<sup>5</sup> Judge Tjoflat authored the majority opinion for the court, but the other members of the majority did not join sections IIIB and IIIC of his opinion.

<sup>6</sup> Davis, 120 F.3d at 1402 (requiring schools to take appropriate action to respond to sexual harassment would force schools to "immediately isolate an alleged harasser from other students to avoid the threat of a lawsuit under Title IX") (Tjoflat, J.).

schools to a particular course of discipline, nor does it supplant the school's important role in meting out punishment and other forms of discipline. Rather, it encourages schools to confront harassment promptly and consider thoughtfully how best to respond. Hence, schools retain considerable freedom to respond to allegations of harassment while fulfilling their legal obligations.

#### **A. Requiring Schools to Take Appropriate Steps to Remedy Peer Sexual Harassment Imposes Reasonable Obligations on Schools.**

Both the Department of Education and numerous court cases have established straightforward legal standards delineating schools' responsibilities to respond to peer sexual harassment. The OCR Guidance developed by the Department of Education requires schools to take immediate and appropriate steps to remedy a sexually hostile educational environment upon notice of the harassment. OCR Guidance at 12,039-40. Schools that fail or refuse to respond to known harassment are engaging in discrimination in violation of Title IX by permitting "an atmosphere of sexual discrimination to permeate the education program." Id. at 12,039.

Conversely, schools can avoid liability by taking appropriate steps to remedy the harassment when they learn about it. Id. at 12,039-40. The OCR Guidance directs schools to take steps that are reasonably calculated to remedy the harassment, but leaves schools flexibility and discretion to determine what constitutes an appropriate response given the facts of a particular case. Id. at 12,042 ("What constitutes a reasonable response to information



about possible sexual harassment will differ depending upon the circumstances.”). Under this approach, schools’ liability will turn on their own responses to sexual harassment allegations, rather than on the specific acts of individual students. This approach also is consistent with the broader goal of encouraging schools to concentrate on developing sound practices for responding to harassment allegations.<sup>7</sup> Moreover, preserving this basic legal standard while recognizing a peer harassment cause of action gives schools clear guidance about their legal obligations and an incentive to confront harassment when it happens, and it provides victims with a vehicle for remedying discrimination.

In accordance with this standard, a number of courts have required schools to take prompt and appropriate action to respond to known peer sexual harassment.<sup>8</sup> Consistent

<sup>7</sup> See Kathryn Wells Murdock & David Kysilko, National Ass’n of State Bds. of Educ., Sexual Harassment in Schools: What It Is, What To Do 6 (David Kysilko ed., 1993); In Our Own Backyard at 3.

<sup>8</sup> See, e.g., Oona R.-S. v. McCaffrey, 143 F.3d 473, 477 (9th Cir. 1998) (schools have a duty under Title IX to take reasonable steps to prevent harassment), amended on denial of reh’g, No. 95-16046, 1998 WL 216944 (9th Cir. May 5, 1998), petition for cert. filed, 67 U.S.L.W. 3083 (U.S. June 19, 1998) (No. 98-101); Doe v. University of Ill., 138 F.3d 653, 661 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3083 (U.S. July 13, 1998) (No. 98-126) (schools may be held liable for failure to take prompt, appropriate action in response to student-to-student sexual harassment); Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.2d 949, 958 (4th Cir. 1997), vacated and reh’g en banc granted, Nos. 96-1814, 96-2316 (4th Cir. Feb. 5, 1998) (Title IX prohibits failure to take prompt and adequate remedial action to remedy a known sexually hostile environment); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1378 (N.D. Cal. 1997) (schools can be liable, under Title IX, for failing to

with the OCR Guidance, these courts have made clear that schools will not be held liable solely because they choose one course of action over another. For instance, the Seventh Circuit has affirmed that the choice facing school officials with knowledge of peer sexual harassment “is not a binary one between an obviously appropriate solution and no action at all.” Doe v. University of Ill., 138 F.3d at 667-68. Instead, officials may select among “a range of responses,” and are required merely to choose a responsive strategy that involves “investigat[ing] aggressively” all sexual harassment grievances and “respond[ing] consistently and meaningfully when those complaints are found to have merit.” Id. Thus, a school’s liability does not rest on whether or not the harassment actually ended. Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp. 467, 480 (D.N.H. 1997) (“[E]ven if the sexual harassment

take adequate steps to remedy harassment); Collier v. William Pa. Sch. Dist., 956 F. Supp. 1209, 1212 (E.D. Pa. 1997) (schools may be held liable under Title IX for failing to respond to peer sexual harassment); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741, 748 (E.D. Ky. 1996) (schools liable under Title IX for failure to remedy known peer sexual harassment), aff’d, 142 F.3d 360 (6th Cir. 1998); Bruneau v. South Kortright Cent. Sch. Dist., 935 F. Supp. 162, 172 (N.D.N.Y. 1996) (educational institutions violate Title IX if they fail to take steps to remedy peer sexual harassment); Doe v. Petaluma Sch. Dist., 949 F. Supp. 1415, 1425, 1427 (N.D. Cal. 1996) (schools may be liable for hostile environment claims if they know about harassment but fail to take prompt and appropriate remedial action); see also Monteiro v. Tempe Union High Sch. Dist., No. 97-15511, 1998 WL 727338, at \*9 (9th Cir. Oct. 19, 1998) (school district obligated to take reasonable steps to eliminate known peer racial harassment in accordance with Department of Education’s interpretation of Title VI). But see Davis, 120 F.3d at 1406 (finding schools not liable for peer sexual harassment under Title IX); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir.) (same), cert. denied, 117 S. Ct. 165 (1996). See generally OCR Guidance at 12,039-40.

continues, the school could possibly be exonerated if it took reasonable steps to stop the harassment every time it became aware of it.”).<sup>9</sup>

Courts may not second-guess school officials’ professional judgments that are “plausibly directed toward putting an end to the known harassment.” Doe v. University of Ill., 138 F.3d at 667. This even-handed approach holds schools accountable for their own actions, without interfering with schools’ discretion to evaluate the particular facts of each case, weigh potential responses, and determine the appropriate steps to remedy sexual harassment.

Yet despite the range of options the Monroe County Board of Education and the Hubbard School had at their disposal to fulfill their legal duty of responding promptly and appropriately to the Davises’ complaint, they did virtually nothing to remedy the sexual harassment that LaShonda suffered for six months. Respondents were not limited to the extremes of complete inaction on one hand, or immediate suspension or expulsion, on the other hand, as feared by one member of the court below. See Davis, 120 F.3d at 1401 (Tjoflat, J.). Rather, school officials could

<sup>9</sup> In the analogous context of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e *et. seq.*, federal courts have regarded prompt and thorough investigations, including interviews of witnesses, and remedial and disciplinary measures as indicia of adequate responses to sexual harassment, *see, e.g., Mockler v. Multnomah County*, 140 F.3d 808, 813-14 (9th Cir. 1998). Thus, under Title VII, courts have had many years of experience evaluating the adequacy of responses to sexual harassment.

have investigated the complaint,<sup>10</sup> interviewed witnesses, counseled the alleged harasser, imposed progressive discipline, or, at the very least, permitted LaShonda to change her seat so that she did not have to sit next to the alleged harasser for three months. In fact, school administrators would have entertained no doubt regarding the availability of these measures, had the school adopted a sexual harassment policy and grievance procedures before receiving LaShonda’s complaint. In neglecting to acknowledge the breadth of viable alternatives to automatic suspension or expulsion, Judge Tjoflat exaggerates the burden confronting schools that aim to remedy peer sexual harassment, and therefore permits schools to condone even the most egregious conduct.

**B. Schools Routinely Handle a Wide Range of Disciplinary Matters and Have Adequate Existing Mechanisms for Addressing Peer Sexual Harassment Complaints.**

As part of their multifaceted role as educators, schools often must grapple with a variety of issues arising from students’ interactions with one another inside and outside the classroom. Schools must balance their academic responsibility to students with their concurrent “custodial and tutelary” responsibilities that allow them to maintain order and discipline in schools consistent with constitutional safeguards.<sup>11</sup> Vernonia, 515 U.S. at 655; *see also Tinker*

<sup>10</sup> Indeed, even a cursory investigation would have confirmed the harassment, given that G.F., the student who harassed LaShonda, did not deny a criminal charge of sexual battery. Davis, 120 F.3d at 1394.

<sup>11</sup> This Court has often provided schools with guidance for ensuring that the students’ constitutional rights are preserved in the



*v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 507 (1969) (stressing the "comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools"); *T.L.O.*, 469 U.S. at 342 n.9 ("The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities."). To accomplish these goals, schools have at their disposal an array of possible interventions, including counseling, conflict resolution strategies, student codes of conduct, and disciplinary measures, that can be used to resolve conflicts when they arise and foster positive relationships between students.<sup>12</sup>

---

course of maintaining school discipline. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (considering First Amendment implications of speech restrictions in student newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (considering First Amendment implications of symbolic speech); *Goss v. Lopez*, 419 U.S. 565 (1975) (considering due process implications of suspensions lasting up to 10 days); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995) (considering Fourth Amendment implications of random drug tests); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (considering Fourth Amendment implications of warrantless searches by school officials allegedly fueled by reasonable suspicion); *Ingraham v. Wright*, 430 U.S. 651 (1977) (considering Eighth Amendment implications of corporal punishment).

<sup>12</sup> Under Georgia law, for example, local boards of education that receive state funds must "adopt a student code of conduct" and "provide for disciplinary action against students who violate [that] code." Ga. Code Ann. § 20-2-751.3(a), (b) (Supp. 1998). Further, schools are required to develop "school safety plans" to help curb school violence and promote a safe learning environment. *Id.* § 20-2-

Coupled with schools' general experience in making disciplinary decisions, these mechanisms also equip schools to respond to peer sexual harassment. By adapting the structural apparatus they already have in place to the special context of sexual harassment, schools may well be able to resolve grievances informally, thereby avoiding litigation.<sup>13</sup> Accordingly, because litigation is far from inevitable in any given sexual harassment case, imposing liability on schools who fail to address sexual harassment complaints promptly and appropriately **does** not inexorably inundate all schools with lawsuits, *see infra* Part II -- contrary to the lower court's assertions, *see Davis*, 120 F.3d at 1405 (Tjoflat, J.).

### C. A Large Body of Educational Expertise Confirms That Schools Have Abundant Options for Responding to Peer Sexual Harassment Complaints.

Schools retain the flexibility to fashion an educationally appropriate, fact-specific response to peer sexual harassment within the general legal guidelines the OCR Guidance articulates. Once a school has notice of harassment, it must investigate what happened, *see* OCR Guidance at 12,042. However, the school may tailor its investigation to the particular circumstances of the

---

1185(a) (1996). The state also requires the State Board of Education to develop a "school climate management program" to help, *inter alia*, decrease student suspensions, expulsions, and dropouts; and to produce model codes of behavior and discipline upon the request of a local school system. *Id.* § 20-2-155(a). Additionally, the state authorizes the State Board of Education to create an in-school suspension program. *Id.* § 20-2-155(b).

<sup>13</sup> *See infra* note 17.

grievance, *see id.* For example, the school could set up a complaint management system in advance to facilitate a prompt and thorough response. Robert J. Shoop, Sexual Harassment Prevention: A Guide for School Leaders 58 (1997). This system could designate a person or team in each school building to oversee sexual harassment complaints. *See* Eleanor Linn et al., Bitter Lessons for All: Sexual Harassment in Schools, in Sexuality and the Curriculum: The Politics and Practices of Sexuality Education 106, 119 (James T. Sears ed., 1992); Robert J. Shoop & Debra L. Edwards, How to Stop Sexual Harassment in Our Schools: A Handbook and Curriculum Guide for Administrators and Teachers 126 (1994). Schools need not hire additional personnel to fulfill this function: the complaint manager may be a principal, assistant principal, counselor, or teacher. Shoop & Edwards, *supra*, at 126. Notwithstanding the conclusion of one member of the court below, *see Davis*, 120 F.3d at 1402 ("Physical separation of the alleged harasser from other students is the only way school boards can ensure that they cannot be held liable for future acts of harassment.") (Tjoflat, J.), a school may choose to separate the alleged harasser from the target of harassment while the investigation is underway, but is not necessarily legally required to do so, *see* OCR Guidance at 12,043.

If a school finds that sexual harassment has occurred, it must take immediate and appropriate steps to end the harassment. *See* OCR Guidance at 12,042; *see also Oona R.-S.*, 143 F.3d at 477 (holding that "the duty to take reasonable steps to remedy a known hostile environment created by a peer is clearly established" in the Ninth Circuit). Again, however, a school has the discretion to vary its response according to the severity of the

harassment, any previous record of harassment, and its existing disciplinary procedures. For instance, a school may decide to counsel, warn or take disciplinary action against the harassing student, with escalating consequences such as suspension or expulsion if the initial measures do not curb the harassment. *See* OCR Guidance at 12,043.

Over and above the legal standard requiring schools to respond to known sexual harassment, there is much schools can do to maximize the effectiveness of their response and to prevent harassment from recurring. To increase the likelihood that its response to sexual harassment will be effective, a school might well make efforts to foster greater awareness of sexual harassment among complaint managers and other community members such as teachers, administrators, staff, students, and parents. Toward this end, schools can choose among a variety of approaches. Although schools are legally required to adopt and publish a policy against discrimination, as well as grievance procedures for complaints of sex discrimination, *see* 34 C.F.R. § 106.8(b), schools may adapt the policy to their specific situation, as long as the policy enables them to respond effectively to sexual harassment. *See* OCR Guidance at 12,044. Because the policy's effectiveness is directly linked to the process a school uses to develop it, schools may wish to consider involving teachers, parents, and students in drafting the policy. *See* Shoop, *supra*, at 50; *see also Michigan Middle School Students Craft Sexual Harassment Policy For Their School*, Educator's Guide to Controlling Sexual Harassment, Nov. 1998, at 1-2 (reporting that harassment complaints at Michigan middle school declined following adoption of sexual harassment policy drafted by eighth-grade civics class; noting commentators' opinions that



permitting students to draft own sexual harassment policy is "a good way to get kids to take such policies seriously"). Schools may even raise the consciousness of the wider community by using poster campaigns encouraging the reporting of sexual harassment. See Eleanor Linn, Hamilton Fish Nat'l Inst. on Sch. & Community Violence, Effectiveness of Existing Programs and Approaches for Reducing Sexual Harassment and Sexual Violence in School (forthcoming Dec. 1998) (manuscript on file with author).

Finally, training programs that focus on educating the entire educational community to recognize and correct sexual harassment can further schools' success in responding effectively to harassment complaints. See Shoop, *supra*, at 101-02. Once again, schools can draw upon a multitude of alternatives in designing training programs for parents and employees, see *id.* at 102, as well as students, see *id.* at 110, and there are many resources available to assist them.<sup>14</sup>

<sup>14</sup> In addition to those already cited, a small sample of the wide range of available resources includes the following:

- Pam Hillesheim-Setz et al., "Be A Sport": What You Need to Know About Sexual Harassment (1994);
- Minnesota Dep't of Educ., Sexual Harassment to Teenagers: It's Not Fun / It's Illegal: A Curriculum for Identification and Prevention of Sexual Harassment for Use With Junior and Senior High School Students (rev. ed. 1996);
- Kathryn Wells Murdock & David Kysilko, National Ass'n of State Bds. of Educ., Sexual Harassment in Schools: What It Is, What to Do (David Kysilko ed., 1993);

The experiences of schools around the country confirm that these responses to sexual harassment are both feasible and effective. For instance, schools in Minnesota and Nebraska have adopted policies against sexual harassment, in-service programs for employees, and age-appropriate curricula for students. These schools have found that such strategies help to resolve harassment complaints without litigation; decrease the incidence of harassing behaviors; facilitate efforts to counsel students and parents in the wake of incidents of harassment; and prompt more assertive behavior by victims of sexual harassment. See Shoop & Edwards, *supra*, at 142-48. In several Massachusetts schools, both male and female

- 
- Sue Sattel, Sexual Harassment in Schools: A Guide to Prevention, Intervention, and Investigation (Jamie Whaley ed., 1996);
  - Nan Stein & Lisa Sjostrom, National Educ. Ass'n Prof'l Library, Flirting or Hurting? A Teacher's Guide on Student-to-Student Sexual Harassment in Schools (Grades 6 Through 12) (1994);
  - Susan Strauss et al., Girls and Boys Getting Along: Teaching Sexual Harassment Prevention in the Elementary Classroom - Includes Grades K-3 and 4-6 Curricula (rev. ed. 1997);
  - Susan Strauss & Pamela Espeland, Sexual Harassment and Teens: A Program for Positive Change (1992); and
  - Thompson Publ'g Group, Educator's Guide to Controlling Sexual Harassment (1994) (offering monthly updates on recent cases and changes in sexual harassment law).

students as young as ten years old have reported the benefits of curricula focusing on sexual harassment: an awareness of the harm of sexual harassment; an increased ability to stop harassing behavior by their peers; and, above all, the freedom to focus on classes without the disruptions previously caused by constant sexual harassment. See Sexual Harassment in School at 150, 160.

## **II. Schools Can Fulfill Their Obligations to Students Who Have Been Sexually Harassed Without Jeopardizing Their Legal or Financial Position.**

Requiring schools to respond to sexual harassment is entirely consistent with their legal obligations to students accused of harassment. Schools need not automatically suspend or expel students accused of sexual harassment in order to avoid liability, see supra Section I.A. However, even in those instances where serious punishment is necessary, school officials can respond to sexual harassment complaints without infringing on accused harassers' due process rights or wreaking financial havoc on public institutions. Hence, the specter of "whipsaw" and "sky-rocketing" liability raised below mischaracterizes completely the result of holding schools responsible for peer sexual harassment. Davis, 120 F.3d at 1401 (Tjoflat, J.). Far from excusing school officials from enforcing Title IX and working to eliminate sexual harassment, the need to provide due process to students accused of harassment offers a strong incentive to safeguard all students' rights. As the OCR Guidance recognizes, "procedures that ensure the Title IX rights of the complainant while at the same time according due process to both parties involved will lead to sound and supportable decisions." Id. at 12,045.

Indeed, school policies requiring officials to respond to peer sexual harassment complaints provide a vehicle for accommodating alleged offenders' due process rights. For instance, should officials propose to expel a student for sexual harassment, the subsequent proceedings could and should include adequate due process protections. First, the school's sexual harassment committee could conduct a hearing that allowed the alleged harasser to exercise his or her due process rights through such means as testifying, presenting witnesses, questioning the principal's witnesses, and making a closing statement. The school could give the student and his or her parents written notice of the time and place of the hearing and of the charge against the student. Second, the committee could issue a report summarizing its findings and conveying its decision. Shoop & Edwards, supra, at 168-69. These safeguards would far exceed the minimum due process protections for expulsion, the most severe of educational sanctions. Even for expulsion, courts have merely held that due process requires schools to give sufficient notice of the substance of the charges and the underlying facts to allow students to respond meaningfully. See Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1000 (5th Cir. 1975) (noting that due process requires notice and some opportunity for hearing before expulsion for misconduct can be imposed; deeming sufficient notice that fairly enabled students to present defense at hearing); Hatch v. Goerke, 502 F.2d 1189, 1195 (10th Cir. 1974) ("[A]t least an informal hearing, with knowledge of the misconduct charged and an opportunity to respond or appeal for leniency, is called for before the opportunity to receive an education is denied through an expulsion or a lengthy or indefinite suspension."); see also Goss v. Lopez, 419 U.S. 565, 581-84 (1975) (construing Due Process Clause to require that student facing suspension of ten days



or fewer be given oral or written notice of charges, explanation of evidence in authorities' possession, and opportunity to present his or her version of events at an informal hearing).<sup>15</sup>

Moreover, the threat of so-called "whipsaw" liability has not excused school officials from enforcing other anti-discrimination statutes. For example, this Court recognized that schools were liable for teacher-to-student harassment under Title IX, *see Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), despite schools' obligation to uphold the due process rights of teachers accused of harassment, *see Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 777 (9th Cir. 1982) (holding that teacher terminated for sexually harassing students during term of one-year employment contract had protected property interest, triggering due process protections for termination). Schools are likewise required to protect students from peer racial harassment under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq., *see Monteiro v. Tempe Union High Sch. Dist.*, 1998 WL 727338, at \*9 (adopting Department of Education's interpretation of Title VI as prohibiting peer racial harassment), although students facing disciplinary action for racial harassment would surely enjoy the same due process

<sup>15</sup> The mere possibility that school officials may face personal liability under 42 U.S.C. § 1983 for transgressing Title IX does not give them "an impermissible financial incentive to punish alleged student harassers," generating due process violations, as is claimed in *Davis*, 120 F.3d at 1403-04 & n.21 (Tjoflat, J.). Rather, this financial interest is "highly speculative and contingent," and cannot give rise to a due process violation. *See Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813, 826 (1986); *see also Doe v. University of Ill.*, 138 F.3d at 664n.8; *Davis*, 120 F.3d at 1407 (Carnes, J., concurring).

protections as students confronted with the same punishment for sexual harassment. Yet no one has suggested in these instances that schools can invoke the due process rights of alleged harassers as a justification for evading their legal obligations.<sup>16</sup>

Nor have courts -- the *Davis* court included, *see* 120 F.3d at 1406 (Tjoflat, J.) -- regarded the mere availability of a state tort remedy as grounds for relieving schools from their duty of care to students, based on a fear that schools would be overwhelmed with tort lawsuits. *See, e.g., Cooper v. Baldwin County Sch. Dist.*, 386 S.E.2d 896, 898 (Ga. Ct. App. 1989) (noting that a school has a "duty of exercising ordinary care for the safety of its pupils from defects in the premises or from dangerous activities in which other pupils are engaged under the [school's] supervision").

As Judge Carnes' concurring opinion notes, the logical extension of Judge Tjoflat's reasoning would be to eviscerate state officials' legal obligations in a variety of settings, including jails and prisons, in which one person's complaint about another triggers due process concerns. *Davis*, 120 F.3d at 1409 (Carnes, J., concurring). For example, it would undermine public agencies' duty to respond to complaints of sexual harassment at work, *see, e.g., Bator v. Hawaii*, 39 F.3d 1021, 1029 (9th Cir. 1994); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1187 (7th

<sup>16</sup> Exempting schools from liability for their failure to respond to peer sexual harassment would also produce the anomalous result of retaining protection for teachers against sexual harassment by fellow teachers and even students, under Title VII, 29 C.F.R. §1604.11(e) (1995), while denying protection for students against sexual harassment by fellow students.

Cir. 1986), in which they must similarly respect the accused's due process rights, see Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-46 (1985) (finding that due process protections attach to deprivation of constitutionally protected property interest in public employment).

Finally, the opinion errs not only in predicting a "substantial" amount of litigation as a result of recognizing peer sexual harassment as a violation of Title IX, but in using this prediction as a basis for eliminating liability. See Davis, 120 F.3d at 1405-06 (Tjoflat, J.). First, the opinion relies on a survey for the proposition that sixty-five percent of students in grades eight to eleven suffered peer sexual harassment. Accordingly, the opinion anticipates that "whipsaw liability would arise in a substantial number of cases." Id. at 1405. But that survey neither evaluates the proportion of sexual harassment grievances that lead to litigation nor assesses the viability of those lawsuits, once filed.<sup>17</sup> Rather, the survey merely describes the prevalence and nature of sexual harassment.<sup>18</sup> As such, the survey

<sup>17</sup> Not every case of sexual harassment warrants litigation or other elaborate dispute-resolution mechanisms. There will be many situations where teachers and students can -- and should -- handle complaints informally to everyone's satisfaction. See Sexual Harassment in School at 158-59 ("We need to promote non-litigious remedies and to transport the lessons of the lawsuits into the classroom. Lawsuits can be preempted through preventive and sensible measures employed in the schools."); Shoop & Edwards, supra, at 137-38 (outlining five distinct steps educators may take to eradicate sexual harassment in schools, in lieu of litigation and legislative action).

<sup>18</sup> At any rate, studies of sexual harassment at work show that of employees who experience sexual harassment and attempt some form of response, only six percent make formal reports. See United States Merit Sys. Protection Bd., Sexual Harassment in the Federal Workplace

offers no support for Judge Tjoflat's prediction.

In any event, the opinion illogically seeks to respond to widespread discrimination by eliminating liability for that discrimination. Schools' desires to avoid monetary damages from litigation should provide an incentive for education, prevention, and enforcement, instead of offering a rationale for protecting discrimination. In fact, this Court rightly rejected just such a cost-based defense to liability in the analogous<sup>19</sup> context of Title VII. See City of Los Angeles v. Manhart, 435 U.S. 702, 717 (1978) ("[N]either Congress nor the courts have recognized such a [cost justification] defense under Title VII."). If schools could successfully point to the financial burdens of litigation to escape accountability for peer sexual harassment, any public institution could similarly complain of financial ruin to avoid liability for any civil rights violation.<sup>20</sup> This runs afoul of our national commitment to civil rights laws, which specifically prohibit and provide a remedy for discrimination.<sup>21</sup>

at viii (1995).

<sup>19</sup> See supra note 9.

<sup>20</sup> The threat of boundless liability in damages for failing to respond to sexual harassment is all the more illusory in light of this Court's recent decision in Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989 (1998). In Gebser, the Court held that a Title IX damages remedy was unavailable unless an official with the authority to address discrimination and institute corrective measures had actual notice of discrimination and exhibited deliberate indifference. Id. at 1999.

<sup>21</sup> See, e.g., 42 U.S.C. § 2000e (Title VII) (prohibiting discrimination based on race, color, religion, sex, or national origin); 42 U.S.C. § 2000d (Title VI) (prohibiting discrimination on race, color,



**CONCLUSION**

Exempting schools from liability sends the wrong message to schools and students alike -- that students can expect no support from their schools in confronting peer sexual harassment, however egregious. Accordingly, this Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

Dated: November 10, 1998

Respectfully Submitted,

JUDITH L. LICHTMAN  
DONNA R. LENHOFF\*  
\* *Counsel of Record*  
JOCELYN C. FRYE  
SANDHYA L. SUBRAMANIAN

National Partnership  
for Women & Families  
1875 Connecticut Avenue, N.W.  
Suite 710  
Washington, D.C. 20009  
(202) 986-2600

---

or national origin); 29 U.S.C. § 621 (Age Discrimination in Employment Act); 42 U.S.C. § 12101 (Americans with Disabilities Act).

## **APPENDIX**

**The National Education Association (NEA)** is a nationwide employee organization with approximately 2.4 million members, the vast majority of whom are teachers and others employed by public school districts, colleges and universities. NEA is strongly committed to ending gender discrimination by educational institutions, including sexual harassment, and, to this end, firmly supports the vigorous enforcement of Title IX.

**The National Association of Social Workers (NASW)** is a professional membership organization comprised of more than 155,000 social workers with chapters in every state, the District of Columbia and internationally as well. Since 1955, the NASW's purposes have to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole and improving the quality of life through the utilization of social work skills. In furtherance of its purposes, NASW adopts policy statements on issues of importance to the social work community. In its "Policy on Preschool, Elementary, and Secondary Education," NASW supported the proposition that "every child should be guaranteed the right to quality, nonsexist and integrated education." NASW believes that the "right to equal educational opportunity and to high-quality education includes a nonsegregated, nonsexist environment." School social workers and other professional social workers look to the protection of the law to achieve these important goals for the youth educated in American schools.

**The Illinois Coalition Against Sexual Assault (ICASA)** is a not-for-profit organization consisting of thirty-one community-based sexual assault centers in Illinois and a central headquarters located in Springfield. Founded in



1977, the purpose of ICASA is to end sexual violence, including sexual harassment, and to alleviate the suffering of its victims. To accomplish these goals, ICASA centers counsel victims, advocate for victims in the medical and criminal justice systems, present educational programs and provide information and referral services. In FY1997 alone, ICASA sexual assault centers provided counseling and advocacy to 12,238 victims of sexual violence. The ICASA administrative staff in Springfield also conduct trainings, maintain a resource library and advocate on a statewide level for the rights of victims of sexual violence. ICASA has an interest in this case by insuring that people are protected from sexual harassment in all situations, whether the harasser is a teacher, a supervisor, or, as in this case, a student.

**Dr. Larry Bennett** is an Assistant Professor at the Jane Addams College of Social Work at the University of Illinois at Chicago. He has published numerous articles and book chapters on peer sexual harassment and on domestic violence, including "Peer Sexual Harassment and the Social Work Response," *School Social Work: Practice and Research Perspectives* (co-authored with S. Fineran) (forthcoming, 1999); "Teen Peer Sexual Harassment: Implications for Social Work Practice in Education," *Social Work* (co-authored with S. Fineran) (1998); and "Gender and Power Issues of Peer Sexual Harassment Among Teenagers," *Journal of Interpersonal Violence* (co-authored with S. Fineran) (in press). Currently, he is principal investigator evaluating the State of Illinois' standards for batterers' intervention programs and the effectiveness of victim information programs. Mr. Bennett earned a B.A. at Southern Illinois University in 1969, an M.A. in Human Relations from Governors State University in 1976, an

M.S.W. at the University of Illinois at Chicago in 1983 and a Ph.D. from the University of Illinois at Chicago in 1990.

**Dr. Susan Fineran** is an Assistant Professor at Boston University School of Social Work. She is the author of numerous publications on the sexual harassment of students, including "Teen Peer Sexual Harassment: Implications for Social Work Practice in Education," *Social Work* (co-authored with Bennett, L.) (1998); "Gender and Power Issues of Peer Sexual Harassment Among Teenagers," *Journal of Interpersonal Violence* (co-authored with Bennett, L.) (in press); "Peer Sexual Harassment and the Social Work Response, School Social Work: Practice and Research Perspectives, 4th Ed., (co-authored with Bennett, L.) (1998); and *Potential Risk Factors for Sexual Harassment and Sexual Violence in Schools* (Hamilton Fish Institute on Community and School Violence, George Washington University) (1998). Her research focuses on risk factors that contribute to the perpetration and experience of peer sexual harassment, including students' emotional reaction to harassment, peer relationships and school responses. Ms. Fineran received her Ph.D. from the University of Illinois at Chicago in 1996.

**Dr. Louise Fitzgerald** is a Professor of Psychology and Women's Studies at the University of Illinois at Urbana-Champaign where she teaches a graduate course on the legal, behavioral, and organizational aspects of sexual harassment. Dr. Fitzgerald is a nationally known expert who has been writing and teaching about sexual harassment in schools, universities, and the workplace for over 15 years. Her publications in this area include: "Breaking Silence: The Sexual Harassment of Women in Academia and the Workplace," *Handbook of the Psychology of*

*Women*, (F. L. Denmark & M. A. Paludi, eds.) (co-authored with A. J. Omerod) (1993); "Sexual Harassment: The Definition and Measurement of a Construct," *Ivory Power: Gender and Sexual Harassment in the Academy*, (M. Paludi, ed.) (1990); *Sexual Harassment in Higher Education: Concepts and Issues* (National Education Association Monograph 1992); "Sexual Harassment: A Preliminary Test of an Integrated Model," *Journal of Applied Social Psychology* (co-authored with M. Hesson-McInnis)(1997); "Measuring Sexual Harassment: Theoretical and Psychometric Advances," *Basic and Applied Social Psychology* (co-authored with M. Gelfand and F. Drasgow)(1996). She has consulted on this topic with numerous federal agencies and national organizations, including the National Education Association. Dr. Fitzgerald has been awarded several honors for her work, including, in 1994, the Distinguished Contribution Award of the Washington Educational Press for Outstanding Treatment of a Public Concern and the *Shannon Award* from the National Institutes of Mental Health for her study "Outcomes of Sexual Harassment: An Integrative Process Model." In addition, she received a Women's Educational Equity Act grant from the U.S. Department of Education for her study "Tarnishing the Ivory Tower: Sexual Harassment on Campus." Dr. Fitzgerald earned her B.A. in Psychology *magna cum laude* from the University of Maryland in 1974, and her M.A. and Ph.D. in Psychology in 1975 and 1979 respectively from Ohio State University.

**Sandra M. Gordon** is the Student Services Liaison at the New Market Vocational Skills Center in Tumwater, Washington. She is an education consultant with extensive experience working with schools and vocational training programs on developing and implementing sex equity, bias

elimination and sexual harassment prevention programs. In her role as student services liaison, Ms. Gordon investigates harassment complaints, provides counseling and educational materials to victims and perpetrators of harassment and serves as an equity resource for the campus community. For six years, she has coordinated the efforts of the Ambassador Leadership Program in providing equity education, peer counseling and community building activities to the New Market campus and area high schools. Ms. Gordon is a member of the National Coalition for Sex Equity in Education and the Tumwater School District Diversity Committee.

**Karetta Hubbard**, co-founder of Hubbard & Revo-Cohen, Inc. (HRC) in Reston, Virginia, has over 15 years of experience in the field of sexual harassment prevention. She has counseled numerous organizations in both the public and private sector on strategies for sexual harassment prevention and intervention. Her clients include Mitsubishi, Nissan, Mazda, Ford/UAW, the U.S. Navy, numerous federal and state agencies, and several non-profit organizations such as the National Education Association. Ms. Hubbard attended the University of Virginia and received her B.A. from George Mason University.

**Melissa Josephs** is a Senior Policy Associate for the Women Employed Institute in Chicago, Illinois. She leads Working Partnerships' Sexual Harassment Prevention Services, a division of Women Employed, and has worked extensively with schools, municipal agencies and corporations on sexual harassment prevention, training and response. Ms. Josephs received a B.A. in English and Journalism from the University of Wisconsin-Madison and a J.D. from IIT Chicago-Kent College of Law.



**Senator Jeanne Kohl** represents the 36th District in the Washington State Senate. She also is on the faculty at the University of Washington, teaching courses on gender equity in education. From 1978-1984, Senator Kohl served as Program Manager for Project Equity, the Sex Desegregation Assistance Center for Region IX of the U.S. Department of Education, assisting school districts in implementing Title IX. In addition, Senator Kohl was Assistant Dean of Students, Coordinator of Women's Programs at the University of California, Irvine, and Principal Investigator for two grants funded by the Women's Educational Equity Act of the U.S. Department of Education. Senator Kohl holds a Ph.D. in Sociology of Education from U.C.L.A.

**Nancy B. Kreiter** directs the research and equal opportunity monitoring programs of Women Employed Institute in Chicago, Illinois and is a nationally recognized authority on sexual harassment in the workplace. One of three appointed consent decree monitors in the Mitsubishi \$34 million class-action sexual harassment case, she oversees Mitsubishi Motor Manufacturing of America's efforts to respond to internal sexual harassment complaints and comply with sexual harassment policies. Ms. Kreiter holds a Masters of Science Research Certificate in Economics from the London School of Economics and Political Science.

**Eleanor Linn** is the Senior Associate Director of the Programs for Educational Opportunity/Center for Sex Equity in Schools at the University of Michigan, School of Education. Ms Linn has worked extensively as a consultant to schools and school districts, educators, community

groups and individuals seeking to promote gender equity in education. Ms. Linn has sixteen years experience giving technical assistance on Title IX compliance issues through projects in 25 school districts and two state Departments of Education. She has developed sexual harassment materials for students, and training materials for complaint managers and investigators that have reached more than 200,000 educators and community members in 30 states, 50 State Departments of Education and 85 community-based organizations. Ms. Linn was a major project consultant to *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools*, the American Association of University Women's ground-breaking study on sexual harassment in schools. Ms. Linn has published numerous articles related to sexual harassment in schools including, "The Role of School Mental Health Professionals in Resolving School Related Sexual Harassment Complaints," *Social Work in Education* (coauthored with Rosa Fua) (forthcoming); *Effectiveness of Existing Programs and Approaches for Reducing Sexual Harassment and Sexual Violence in Schools* (Hamilton Fish National Institute on School and Community Violence at The George Washington University) (1998); "The Culture of Sexual Harassment in Secondary Schools" *American Education Research Journal*, (co-authored with V. Lee, R. Croninger and X. Chen) (1996); "Bitter Lessons for All: Sexual Harassment in Schools," *Sexuality and the Curriculum*, (James T. Sears, ed.) (1992). In 1985, Ms. Linn collaborated in writing *Tune In To Your Rights: A Guide for Teenagers About Turning Off Sexual Harassment*, a highly acclaimed and widely distributed publication for students, now with over 200,000 copies sold. Ms. Linn has a M.A.

in Education from Lesley College Graduate School, a M.A.T. in Reading and Human Development from Harvard University and a B.A. from Brandeis University.

**Dr. Bernice Lott** is Professor Emerita of the Psychology and Women's Studies Departments at the University of Rhode Island and has been teaching on gender related issues for over 40 years. She has published scores of articles, studies and books, including: "Sexual Assault and Harassment: A Campus Community Study," *Signs* (coauthored with M.E. Reilly and D. Howard) (1982); "Tolerance for Sexual Harassment Inventory," *Gender Roles: A Handbook of Tests and Measures* (C.A. Beere, ed.) (1990); "Sexual Harassment of University Students" *Sex Roles* (co-authored with M.E. Reilly and S. Gallogly)(1986); *Women's Lives: Themes and Variations in Gender Learning* (1987), and "Sexual Harassment: Consequences and Remedies," *Combating Sexual Harassment in Higher Education*, (B. Lott and M.E. Reilly, eds.) (NEA 1995). Dr. Lott has been honored with numerous awards, including in 1995, the American Psychological Association's *Heritage Award*, for contributions to public policy and to efforts for social change. In 1996, Dr. Lott received the *Carolyn Wood Sherif Award* for contributions to scholarship, teaching, mentoring and leadership in the field of the psychology of women. Dr. Lott received a B.S. from the University of California at Los Angeles in 1950 and a Ph.D. from the University of California at Los Angeles in 1953.

**Carl Moore** is an employment lawyer and Vice President for Client Services at Hubbard & Revo-Cohen, Inc. in Reston, Virginia. While at HRC, he has helped conduct sexual harassment prevention training programs for

numerous clients, including Mitsubishi Motor Manufacturing of America and has been Project Director for the Sexual Harassment Prevention Training initiative of the Naval Sea Systems Command. Mr. Moore has extensive experience on a range of employment-related legal issues. In 1992, he was selected by the Majority and Minority Leaders of the United States Senate to create and administer an EEO complaint process for employees of the Senate. He has served as general counsel for a federal employee appeals board and chief labor counsel for the Department of the Navy. He also has served as executive director and general counsel for a federal employees' union and has designed and taught courses on employment law for the Department of Justice, Legal Education Institute. Mr. Moore holds a B.A. from Texas Tech University and a J.D. from the University of Texas at Austin.

**Lynne Revo-Cohen** is Principal and co-founder of Hubbard & Revo-Cohen, Inc. in Reston, Virginia, and has over 15 years of experience in the field of sexual harassment prevention. She has counseled numerous organizations in both the public and private sector on strategies for sexual harassment prevention and intervention. Her clients include Mitsubishi Motor Manufacturing of America, Nissan, Mazda, Ford/UAW, the U.S. Navy, numerous federal and state agencies, and several non-profit organizations such as the National Education Association. Ms. Revo-Cohen holds a B.A. from the State University of New York at Buffalo and a M.A. from the University of Maryland.

**Dr. Bernice R. Sandler** is a Senior Scholar in Residence at the National Association for Women in Education where she writes the newsletter, *About Women On Campus*. She has over 25 years of experience working with educational



institutions as a trainer, consultant and speaker on issues involving sex discrimination in education, Title IX, policy analysis, and sexual harassment. She has given over 2,000 presentations and wrote the first national reports on campus sexual harassment in 1979 and peer harassment in 1988. Among her more than 100 publications are "Elements of a Good Policy" and "Student-to-Student Sexual Harassment" in *Sexual Harassment on Campus: A Guide for Administrators, Faculty and Students* (B. Sandler and R. Shoop, eds.) (1996), and *The Educator's Guide to Controlling Sexual Harassment* (1991). She received her Ed.D. from the University of Maryland in 1969, and has been awarded ten honorary degrees for her work.

**Sue Sattel** is an equity specialist in Minnesota who has consulted extensively with schools in Minnesota and around the country. She has authored a number of works on sexual harassment, including *Sexual Harassment in Schools: A Guide to Prevention, Intervention and Investigation* (1996) and "Sexual Harassment and Sexual Orientation: The Coaches' Corner," *Overcoming Heterosexism and Homophobia: Strategies That Work*, (J. Sears, and W. Williams, eds.) (1997). She is co-author of an elementary sexual harassment prevention curriculum entitled "Girls and Boys Getting Along: Teaching Sexual Harassment Prevention in the Elementary Classroom - Includes Grades K-3 and 4-6 Curricula" (Minnesota Dept. of Children, Families & Learning 1993, revised 1997), and of revisions of "Sexual Harassment to Teenagers: It's Not Fun/It's Illegal: A Curriculum for Identification and Prevention of Sexual Harassment for Use with Junior and Senior High School Students" (Minnesota Dept. of Children, Families & Learning 1986, revised 1996). Ms. Sattel earned her B.A. in Social Science from Michigan State University in 1964, a

Minnesota Teaching Certificate in 1974 and an M.A. in Curriculum and Instruction from the University of Oregon in 1978.

**Karen D. Schwartzrock** is an education consultant who works with school districts, education service districts, and other education-related organizations in the areas of education, law, discrimination, labor relations, gender equity, educational policy and school improvement. During the past five years she has formulated school district policies and conducted training sessions for administrators, teachers, parents, staff and students in the area of sexual harassment generally and peer sexual harassment specifically. Her training outlines the laws protecting students, the negative consequences associated with sexual harassment and proactive prevention strategies. Ms. Schwartzrock has given papers and presentations at various national and state conferences including for the American Association of School Administrators, American Education Research Association and the Education Law Association. Ms. Schwartzrock has a B.A. in History, a M.A. in Public Administration and is completing her Ph.D. in Educational Policy with an emphasis in education law.

**Dr. Charol Shakeshaft** is Professor of Administration and Policy Studies in the School of Education at Hofstra University and Managing Director of Interactive, Inc., an educational research, evaluation, and technology company. Since 1979, she has directed an institute to help move women into positions in school administration. Her work on equity in schools has taken her into school systems across the United States, Canada, and Europe where she has helped educators make schools more welcoming to women and girls. Her award winning book, *Women in Educational*

*Administration*, has had five press runs. Her newest book, *In Loco Parentis: Sexual Harassment and Abuse in Schools*, will be out in Spring/Summer 1999. In addition to serving on the editorial boards of 6 journals, Professor Shakeshaft is a former division head of the American Educational Research Association, where she also served on its executive board. She is a founding member of the National Women's Studies Association and is on the board of directors for the Project on Gender and Education, the New York State Association for Women Administrators, and Women on the Job. As the author of articles and books on gender and schools, the importance of her research has been recognized by both academic and practitioner audiences through such awards as the New York State Education Department's Sex Equity Award, the American Educational Research Association's Willystine Goodsell Award, Women Educator's Best Research Award, the Educational Press Association of America's Distinguished Achievement Award for Writing, the Jack A. Culbertson Award for Outstanding Contributions to Organizational Theory and Women on the Job's Award for Contributions to Women's Employment. She earned a B.A. in English from the University of Nebraska at Lincoln in 1972, a M.S. in Organizational Behavior Specialization from Texas A&M University in 1978 and a Ph.D. from Texas A&M University in Research, Planning and Evaluation Specialization with supporting work in Sociology in 1979.

**Dr. Robert J. Shoop** is a Professor of Educational Law at Kansas State University. He is the author of eleven books including *Sexual Harassment Prevention* (1997); *Sexual Harassment on Campus* (1996); *How to Stop Sexual Harassment in Our Schools* (1994) and *School Law for the Principal* (1992). In addition, Dr. Shoop is the author of

over 100 articles, monographs and book chapters along with several educational video programs. These credits include: *Sexual Harassment: What is it and Why Should We Care?* for the National School Board Association; *Sexual Harassment: It's Hurting People*, for the National Middle School Association and *Preventing Sexual Harassment*, for Sunburst, Inc. His productions have received national and international recognition including, *First Place Award*, 1996 National Council of Family Relations Annual Media Competition; *1996 Gold Award of Merit*, Houston Film Festival and *1995 Golden Camera Award*, International Film and Video Festival. Dr. Shoop is a recognized authority in the areas of educational law, risk management and sexual harassment prevention and has consulted with educational institutions across the country. Prior to earning his Ph.D. from the University of Michigan, Dr. Shoop worked as a public school teacher and administrator.

**Dr. Nan Stein**, Senior Research Scientist at the Center for Research on Women at Wellesley College, directs several national research projects on sexual harassment and related problems in schools. Ms. Stein has been working on the issue of sexual harassment in schools for over 19 years. In 1979, she developed the first curriculum on sexual harassment in schools for the Massachusetts Department of Education. She provides training to school personnel, gives lectures and conducts interviews; and has written numerous articles, books, teaching guides and curricula on the subject. Her works include *Flirting or Hurting? A Teacher's Guide on Student-to-Student Sexual Harassment in Schools for Grades 6 through 12* (co-authored with Lisa Sjostrom) (NEA Professional Library)(1994); *Secrets in Public: Sexual Harassment in Public (and Private) Schools*



(Center for Research on Women, Wellesley College) (1996), *Bullying and Sexual Harassment In Elementary Schools: It's Not Just Kids Kissing Kids* (Center for Research on Women, Wellesley College)(1997); "From the Margins to the Mainstream: Sexual Harassment in K-12 Schools," *Initiatives*, (Special Issue: Sexual Harassment, Part 2) (1996), and "It Happens Here, Too: Sexual Harassment and Child Sexual Abuse in Elementary and Secondary Schools," *Gender and Education* (S.K. Bilken and D. Pollard, eds.)(1993). She has been commissioned by the Office of Juvenile Justice and Delinquency Prevention at the U.S. Department of Justice to write a paper on sexual harassment and sexual violence in schools. She was co-principal investigator of a *Seventeen* magazine 1992 survey entitled *Secrets in Public: Sexual Harassment in Our Schools*, and will serve as co-principal investigator for the establishment of a National Violence Against Women Prevention Research Center, funded by the Center for Disease Control and Prevention. She has also been a middle-school social studies teacher and a public school drug and alcohol counselor. Ms. Stein holds a B.A. in History from the University of Wisconsin, an M.A. in Teaching from Antioch College Graduate School of Education and an Ed.D. from Harvard University Graduate School of Education.

**Susan Strauss** is a consultant, trainer, speaker and sexual harassment expert. She published the earliest article on sexual harassment of students in secondary schools, entitled "Sexual Harassment in the School: Legal Implications for Principals," *NASSP Bulletin* (1988), and published the first book on the topic, *Sexual Harassment and Teens: A Program for Positive Change* (1992). She has developed and conducted training seminars for over 7,000

administrators, faculty, school staff and students in K-12 and university settings on sexual harassment prevention and intervention strategies, sexual harassment investigations, and sexual harassment survey development and dissemination. She has developed several curricula and training manuals to address sexual harassment in schools, including "Sexual Harassment to Teenagers: It's Not Fun/It's Illegal: A Curriculum for Identification and Prevention of Sexual Harassment for Use with Junior and Senior High School Students" (Minnesota Department of Children, Families and Learning) (1986). Her many other publications in this area include "Sexual Harassment in the Schools," *Vocational Education Journal* (1993); "Sexual Harassment at an Early Age," *Principal* (1994); "Prompt & Equitable: The Importance of Student Sexual Harassment Policies in the Public Schools," *Education Law Reporter* (co-authored with D. Doty) (1996); and "Sexual Harassment/Violence Surveys of Elementary, Secondary and Post-Secondary Institutions in Minnesota Conducted by the Minnesota Attorney General's Office" (presented at the *Ninth International Congress on Women's Health Issues*, Alexandria, Egypt, June, 1998). In 1987, she was awarded the Minnesota Department of Education's Excellence in Educational Equity Award for the work she has done in the area of sexual harassment. Ms. Strauss has an R.N. from Abbott Hospital School of Nursing, a Teaching Certificate in Vocational Education, a B.S. in Psychology & Counseling from Metropolitan State University, an M.S. in Community Health from Mankato State University and a Professional Certificate in Training and Development from the University of Minnesota.

**Margaret Weeks**, Director of Gender Equity and Special Projects of the Nebraska Department of Education, is an

expert on sexual harassment in schools and has worked extensively with educators in developing and implementing sexual harassment prevention programs. Since 1979, Ms. Weeks has assisted school districts in addressing areas of Title IX and Title VII compliance including sexual harassment and student discipline issues. Ms. Weeks has conducted numerous workshops on sexual harassment and gender equity for students, parents, educators and members of the public for the Nebraska Department of Education. She has authored several publications on gender equity and sexual harassment including: "No Joke: Sexual Harassment in Schools" *Leadership Nebraska* (1996) and the "State Board of Education Position Statement on Sex Equity in Education" on behalf of the state of Nebraska. From 1992-1995, Ms. Weeks was a member of the Steering Committee of the National Coalition for Sex Equity in Education. She holds a B.A. in English from Duchesne College, a Nebraska K-12 Teaching Certificate and an M.A. equivalent from the University of Nebraska at Lincoln in Educational Psychology and Human Development.